TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 249.

JOHN F. HILL, PLAINTIFF IN ERROR,

vs.

WARREN S. WOODRUFF.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

(18,954.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 303.

JOHN F. HILL, PLAINTIFF IN ERROR,

vs.

WARREN E. McCORD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

	Original.	Print.
Petition for writ of error	1	1
Assignment of errors	4	2
Order allowing writ of error	10	6
Writ of error	10	7
Citation	12	8
Citation and service	13	8
Bond on writ of error	14	9
Caption	17	10
Judgment of October 13, 1900	18	11
Opinion of Dodge, J	19	11
Motion for rehearing	47	26
Order granting rehearing	48	27
Order taking cause under advisement	49	27
Judgment of October 15, 1901	50	28
Opinion of Dodge, J., on rehearing	51	28

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	Original.	Print
Transcript from circuit court of Douglas county	61	34
Notice of appeal	61	34
Undertaking on appeal	62	34
Affidavit of service of notice, &c	64	36
Summons	66	37
Amended complaint	67	37
Decision of Commissioner of Land Office, April 29, 1892, in Jacobus *vs.* Hill	67	38
Agreement between McLeod, McCord and Hill, Jan. 4, 1893.	73	40
Testimony of Jacobus before register and receiver	79	43
Finding of register and receiver in Hill *vs.* Jacobus	80	44
Decision of Commissioner of Land Office in Hill *vs.* Jacobus.	86	46
Decision of Secretary of Interior in Hill *vs.* Jacobus	90	49
Act of June 3, 1896	92	49
Decision of Secretary of Interior in Hill *vs.* Jacobus, August 4, 1896	96	52
Demurrer to amended complaint	101	54
Answer to amended complaint	102	54
Entry of Jacobus, July 6, 1892	113	59
Final proofs of Jacobus	116	61
Testimony of Wm. Rusk	116	61
Herbert H. Augusta	118	62
Philip W. Jacobus	121	63
Affidavit of Philip W. Jacobus	124	65
Letter of Commissioner to register and receiver, May 15, 1893	128	67
Letter of Commissioner to register and receiver, July 6, 1893.	129	67
Letter of Commissioner to register and receiver, November 18, 1893	131	68
Decision of Commissioner in Hill *vs.* Jacobus, Feb. 24, 1894.	132	69
Evidence before register and receiver	136	70
Testimony of John Sullivan	136	71
George Helmer	166	88
Leonard Hill	177	95
Charles Helmer	199	108
John F. Hill	210	115
J. J. Kenny	233	129
James H. Drummond	236	130
Philip W. Jacobus	250	138
Mrs. L. E. Jacobus	297	164
Mrs. Emma Deitmeyer	325	180
Mrs. Jennie Therriault	327	181
John Toomey	329	183
Tom Toole	338	188
James Battle	341	190
Henry Smith	343	191
John Wylie	347	194
Thomas Rowan	350	195
Thomas Lowe	356	199
Wm. Rusk	363	203
Samuel Marlette	372	208
N. H. Wharton	380	213

	Original.	Print
Report of register and receiver in Hill *vs.* Jacobus	384	215
Decision of Commissioner in Hill *vs.* Jacobus	388	217
Decision of Secretary of Interior in Hill *vs.* Jacobus	393	219
Motion to review in Hill *vs.* Jacobus	394	219
Motion to confirm in Hill *vs.* Jacobus	399	222
Decision of Secretary of Interior in Hill *vs.* Jacobus on motion	401	223
Consent to substitution of attorney	406	225
Order for substitution of attorney	407	226
Findings of fact	408	226
Conclusions of law	421	232
Judgment	424	234
Bill of exceptions	426	235
Offers by plaintiff	426	235
Testimony of W. E. McCord	433	238
Testimony of Daniel McLeod	453	247
Plaintiff rests	462	251
Offers by defendant	462	251
Testimony of D. McLeod (recalled)	463	252
Defendant rests	466	253
Testimony of W. C. Brooks	466	253
Homestead application No. 3012	473	256
Plaintiff's Exhibit D—Homestead affidavit	474	257
Letter of Commissioner, May 15, 1893	476	258
Letter of Commissioner, July 6, 1893	477	258
Letter of Commissioner, November 18, 1893	478	259
Letter of Commissioner, February 24, 1894	479	260
Affidavit of W. E. McCord	482	261
Philip W. Jacobus	484	262
John J. Kenney *et al*	487	263
Report of register and receiver, August 9, 1894	488	264
Decision of Commissioner, January 23, 1895	492	266
Decision of Secretary, April 28, 1896	497	268
Motion for review	497	269
Motion to confirm	502	271
Decision of Secretary on motions, August 4, 1896	503	272
Land decisions	505	272
Rules of Land Department	505	273
Findings of fact	506	273
Conclusions of law	520	279
Exceptions to findings, &c	522	280
Statement as to Exhibits B and C	531	284
Statement as to Exhibit D	532	284
Plaintiff's Exhibit E—Certificate No. 5534	532	285
U—Cash entry, &c	533	285
F—Receipt No. 5534	534	286
Statement as to Exhibit G	535	286
Plaintiff's Exhibit J—Agreement, January 4, 1893	535	287
Statement as to Exhibit K	536	287
Statement as to Exhibits L, M, N, and O	537	287
Statement as to Exhibits P, Q, and R	538	288

	Original.	Print
Plaintiff's Exhibit S—Description of tract	538	288
T—Letter of Commissioner, September 10, 1896	540	289
Statement as to Exhibits V, W, and X	541	290
Plaintiff's Exhibit Y—Decision of register and receiver, May 14, 1891	541	290
Statement as to Exhibit Z	542	290
Plaintiff's Exhibit A[1]—Receipt, December 21, 1892	542	290
B[1]—Receipt, December 27, 1892	543	291
C[1]—Note, December 27, 1892	543	291
D[1]—Note, December 27, 1892	544	292
E[1]—Note, December 27, 1892	544	292
F[1]—Affidavit of Jno. F. Hill	545	292
G[1]—Affidavit of Chas. Helmer	547	293
H[1]—Affidavit of A. B. Ross	548	294
Judge's certificate to bill of exceptions	549	294
Stipulation as to bill of exceptions	550	295
Clerk's certificate	551	295
Order taking cause under advisement	552	296
Judgment	553	296
Opinion	554	297
Clerk's certificate	565	304

1 STATE OF WISCONSIN:

Supreme Court.

WARREN E. McCORD, Plaintiff and Respondent,
vs.
JOHN F. HILL, Defendant and Appellant.

To the Hon. John B. Cassody, chief justice of the supreme court of the State of Wisconsin:

The petition of John F. Hill, defendant and appellant, in the above entitled cause, respectfully represents that he is a citizen of the United States and of the State of Wisconsin, and that on the 12th day of January, 1897, he received a patent from the United States conveying to him 160 acres of Government land described as the north west quarter of section seventeen (17) in township forty eight (48) north of range eight (8) west, in Bayfield county, State of Wisconsin, which he had previously entered under the homestead laws of the United States.

That on the 10" day of Jan'y 1900, the above named plaintiff filed his amended bill of complaint in the circuit court for the county of Douglas, in the State of Wisconsin, alleging that your petitioner had obtained his said patent in consequence of an erroneous construction of the act of Congress commonly known as the "homestead law," and the act of Congress entitled "An act relating to commutation of homestead entries and to confirm such entries when commutation proofs were received by local land officers, prematurely," known as chapter 312 of the Acts of the Fifty fourth Congress, and also referred to as 29 Statutes at Large, page 197, by the
2 Hon. Secretary of the Interior, upon whose decision and under which said acts the rights of your petitioner accrued and were vested, and prayed that your petitioner be decreed to hold the title to said land, which he rightfully held under the patent aforesaid in trust for the said plaintiff, and to transfer such title to the plaintiff.

That the defendant interposed his demurrer to the said complaint, alleging as ground therefor that the complaint did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the said circuit court, whereupon the plaintiff appealed from the order and decision of the circuit court to the supreme court of the State of Wisconsin, and upon a hearing thereon the supreme court reversed the order and decision of said court. That thereupon issue was duly joined and the cause proceeded to trial in said circuit court upon the merits and judgment was rendered and entered therein in favor of the plaintiff according to the prayer of his complaint, decreeing that the defendant by and through the erroneous

construction of such acts of Congress aforesaid, obtained his patent for said land, and that he held the title thus granted in trust for the plaintiff, whereupon the defendant appealed from such judgment and decree to the supreme court of the State of Wisconsin, it being the highest court of law or equity in said State having jurisdiction of such cases, which said court, on the 21st day of March, 1903, affirmed the decision and judgment of the said circuit court. That the records of the proceedings of said cause are now in custody of the said supreme court.

That the aforesaid decree of the said supreme court of the State of Wisconsin, became and is now final, and from which your petitioner has no redress except by writ of error issuing to the said supreme court.

And your petitioner further alleges that the rights of your petitioner were claimed under and vested in him by virtue of the
3 acts of Congress hereinbefore stated and referred to, and that the said judgment and decree of the supreme court aforesaid, involved a construction of the said acts of Congress, under which your petitioner claims his rights aforesaid, and which said rights were decided adversely to him by said decree, as will from the copy of the record herewith presented more fully appear.

That your petitioner hereby presents a good and sufficient bond, and prays that the same may be approved and that your honor will grant the writ of error and sign the citation here presented: and your petitioner will ever pray.

JOHN F. HILL, *Petitioner,*
By W. F. BAILEY,
His Attorney.

4 In Supreme Court, State of Wisconsin.

WARREN E. McCORD, Plaintiff and Respondent,
vs.
JOHN F. HILL, Defendant and Appellant.

Assignment of Errors.

And now comes the defendant and appellant in the above entitled action, and respectfully shows to the court that in the record and proceedings in said action, and in the judgment therein, there is manifest error therein to the great damage of the defendant in this, to wit:

First. That the supreme court of Wisconsin erred in reversing the order of the circuit court of said State sustaining the defendant's demurrer to the plaintiff's complaint herein, wherein said supreme court determined that a cause of action was stated in and by said complaint in favor of the defendant, entitling him to the relief prayed for.

Second. That said court erred in determining the sufficiency of such complaint, in assuming and determining that a mistake of law was made by the Secretary of the Interior other and different from that alleged in the complaint, when in fact no such mistake of law as was alleged in said complaint was made or determined to have been made such, determination having been declared final by said court and as establishing the law of the case.

Third. The said court erred in determining that application could be made to the Secretary of the Interior to confirm a commutation entry under the act of June 3rd, 1896, where made upon the original records, and without any affirmative showing of the conditions expressed in said act.

5 Fourth. The court erred in determining that any mistake of law whatever was made by the Secretary of the Interior in his decision of August 4th, 1896, of the motion of Jacobus to review the previous decision of the Secretary, or in deciding the motion to confirm the entry of Jacobus under the act of June 3, 1896.

Fifth. The court erred in determining that the entry of said Jacobus and his proofs were such as to bring his entry within the provisions of the act of June 3, 1896, and that his said entry and proofs entitled him to confirmation of his entry under said act, and that it appeared from the proofs submitted that but for the error alleged in the complaint, the determination of the Secretary upon said motions to review and confirm the entry of Jacobus, would have been in his favor, resulting in the confirmation of his entry.

Sixth. The court erred in determining that but for the error or mistake of law alleged to have been made by the Secretary of the Interior, Jacobus would have been entitled to the patent for the land.

Seventh. The court erred in its construction of the said act of June 3, 1896, in determining that the six months' actual residence in good faith by the entryman on the land required to be shown by its provisions to be made to appear to the Commissioner of the General Land Office, was not the six months immediately preceding the act of commutation, nor six months after the date of the entry, but six months' actual residence at any time after settlement upon the land.

Eighth. The court erred in determining that the Commissioner of the General Land Office erred in his decision and disregarded a rule of law in requiring Jacobus to furnish supplemental proofs showing residence and cultivation for a period of fourteen months subsequent to July 6, 1892, as well as making any determination of that question, it not being a question at issue or presented by the pleadings.

Ninth. The court erred in determining for itself what were
6 the facts relating to the entry, settlement, residence and improvements upon the land by Jacobus, from the evidence and record in the case, and in predicating its judgment thereon, instead of upon the facts as determined by the Commissioner of the General

Land Office or the Secretary of the Interior, as appearing in their official decisions, among others, the following, to-wit:

1. That it appeared from the testimony taken upon the contest instituted by Hill, that Jacobus had resided upon the land with his wife, was there most of the time from the time of his settlement in February, 1891, until the sale of the land to McCord and McLeod in December, 1892.

2. That Jacobus had no other home.

3. That he was necessarily absent for the purpose of earning a living for himself and wife, and money with which to improve his homestead.

4. That he fully complied with the law as to such residence, occupation and improvement of said land.

5. That the commutation proofs presented by Jacobus Sept. 20, 1892, were truthful and in no manner fraudulent.

Tenth. The court erred in determining that it appeared to the Secretary of the Interior as well as to the Commissioner of the General Land Office, that there was no fraud practiced by Jacobus in the making of his commutation proofs, and in determining also that in fact there was no fraud practiced by Jacobus in making such proofs, but that such proofs were truthful and in no manner fraudulent.

Eleventh. The court erred in determining that there was fraud in the supplemental proofs offered in that it did not appear therein that the land was reconveyed *to* McCord and McLeod to said Jacobus for the purpose of enabling him to make proofs for their benefit, and that it did appear therein that he went back upon the land for the purpose of making proof in their interest and for their benefit,
7 also in determining that it did not so appear in said proofs.

Twelfth. The court erred in determining that the Secretary of the Interior in his decision of August 4, 1896, referred to in saying, "The evidence in the case at bar clearly shows that the entry was not made in good faith and the proofs submitted by the entryman *was* fraudulent as fully set forth in your office decision of January 3, 1895," referred only to the supplemental proofs and the want of good faith in making the same. That the said Secretary referred solely to the supplemental proofs when he used the following language in said opinion: "It is likewise impossible to confirm the entry under the provisions of the act of June 3, 1896, for the same reason, namely, the practice of fraud in making proofs," and not to the original or commutation proofs.

Thirteenth. The court erred in determining that the commutation proofs filed on the 20th day of September, 1892, by Jacobus, were presented in good faith and that his entry was made in good faith.

Fourteenth. The court erred in determining that there was not on June 3, 1896, or at any time prior to the entry made by the defendant on September 7, 1896, 1, Any adverse claimants to the land or of any entry whose rights originated prior to the making of such

final commutation proofs. 2, That there was no other reason on June 3, 1896, at the time of the passage of said act or subsequent, why the title to said lands should not vest in Jacobus as provided in his said certificate of entry. 3, That there was more than six months actual residence in good faith by said Jacobus on the land prior to the making of his commutation proofs of September 20th, 1892. 4, That the entry of Jacobus was not cancelled until September 10, 1896. 5, That the land was not re-entered by the defendant or any other person until September 7, 1896. 6, That the preference right of entry awarded to Hill upon his contest, followed by his entry being allowed soon after the decision of the Sec-
8 retary of the Interior of August 4, 1896, was not within the proviso of the said act of June 3, 1896.

Fifteenth. The court erred in determining that the register and receiver of the land office, by the act of accepting and allowing the commutation proof of Jacobus and issuing to him the receipt and certificate of entry, found upon such proofs that Jacobus had resided upon said land continuously from the 4th day of February, 1891, had cultivated and improved the same and fully complied with all the requirements of the law in regard to the same as a homestead entry.

Sixteenth. The court erred in determining that the Commissioner of the General Land Office in his decision of January 23, 1895, affirmed the statement in the report of the local land officers, to wit: "Upon the whole, the residence of Jacobus upon the land was fairly satisfactory until the offering of his first proof." That he decided and determined that such was the fact. That he decided and determined that Jacobus' entry was in good faith and the court also erred in determining that the Secretary of the Interior, by his decision of April 28, 1896, affirmed such statement of the local land officers. That he decided and determined that such was the fact. That he decided and determined that Jacobus' entry was in good faith and also erred in not determining that both the Commissioner in and by their respective decisions aforesaid, decided and determined that the residence of Jacobus was not satisfactory, was not in compliance with the law and that his entry was not in good faith.

Seventeenth. The court erred in determining that all the facts in the complaint, not inconsistent with the facts specially found were true and sufficiently proven.

Eighteenth. The court erred in determining that the plaintiff was a purchaser in good faith from said Jacobus. That he was within the provisions of the act of June 3, 1896. That he had such right, title or interest as entitled him to maintain this action.

9 Nineteenth. The court erred in determining that the residence, occupation and improvement of the land by Jacobus, up to the time of the conveyance of the same in December, 1892, and all other proceedings, were regular, including the commutation proof, the issuing of the certificate of entry and that Jacobus received

from the Government a full complete equitable title to the land and only the bare legal title remained in the Government.

Twentieth. The court erred in determining that the entry of Jacobus allowed on July 6, 1892, related back to his settlement upon the land. That his commutation was in all respects according to law. That supplemental proofs were not necessary or required. That under the act of June 3, 1896, any concealment or fraud in the supplement- proofs was immaterial. That the decision of the Secretary of the Interior was erroneous by reason of his mistake of law that fraud in the making of said supplemental proofs would prevent Jacobus from receiving title under that act.

Twenty-first. The court erred in determining that the plaintiff was entitled to judgment and decree according to the prayer of his complaint.

Twenty-second. The court erred in awarding and affirming the judgment in the action in favor of the plaintiff and against the defendant.

Twenty-third. The court erred in determining that the defendant was estopped from obtaining the title or patent to said lands by his acts prior to initiation of contest—also in admitting against objection oral evidence of declarations constituting such estoppel.

Twenty-fourth. The court erred in determining that the questions passed upon by the supreme court upon demurrer were *res adjudicata* upon the final hearing upon the merits; as well as determining that any question by reason of such first decision became *res adjudicata*.

W. F. BAILEY,
Attorney for Defendant and Appellant.

10 STATE OF WISCONSIN:

In Circuit Court, Douglas County.

WARREN E. McCORD, Plaintiff and Respondent,
vs.
JOHN F. HILL, Defendant and Appellant.

On reading and filing the petition for writ of error in this cause, and it appearing that the defendant has filed an assignment of errors,

Ordered that the writ of error be allowed on defendant's filing a bond in the sum of one thousand dollars.

JOHN B. CASSODAY,
Chief Justice Supreme Court of Wis.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the supreme court of the State of Wisconsin, being possessed of the record and proceedings, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea rendered in the circuit court for the county of Douglas in the State of Wisconsin, and affirmed upon appeal by the supreme court of said State, which is in said supreme court before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Warren E. McCord, plaintiff, and John F. Hill, defendant, wherein was drawn in question the validity of a treaty or statute of or an
11 authority exercised under the United States, and the decision was against their validity; or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the defendant, as by his complaint appears. We being willing that error, if any, hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you if judgment be thereon given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ; so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States this 18th day of April, 1903.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY,
Clerk of the Circuit Court of the United States
for the Western District of Wisconsin,
By F. D. REED, *Deputy.*

STATE OF WISCONSIN, } ss:
Supreme Court, }

The return to the within writ appears by the schedule hereto annexed.

The return of the justices of the supreme court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

12 The United States of America to Warren E. McCord, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, wherein John F. Hill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf. which said writ and this citation *is* made returnable within thirty days from the date hereof.

Witness the Honorable John B. Cassody, chief justice of the supreme court of the State of Wisconsin, this 18th day of April 1903.

JOHN B. CASSODAY,
Chief Justice Supreme Court of Wisconsin.

13 The United States of America to Warren E. McCord, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, wherein John F. Hill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf which said writ and this citation *is* made returnable within thirty days from the date hereof.

Witness the Hon. John B. Cassody, chief justice of the supreme court of the State of Wisconsin, this 18th day of April, 1903.

JOHN B. CASSODY,
Chief Justice Supreme Court of Wisconsin.

STATE OF WISCONSIN, } ss:
Douglas County, }

F. H. De Groat being first duly sworn, deposes and says that on the 22nd day of April, 1903, he personally served the annexed and

foregoing citation upon Sanborn, Luse and Powell, the attorneys of record for the above named Warren E. McCord, defendant in error, by leaving with said attorneys and handing to them a copy of the said citation, at their office in the city of Superior, Wisconsin.

F. H. DE GROAT.

Subscribed and sworn to before me this 22nd day of April, 1903.

[Seal of H. L. Smith, Notary Public, Douglas County, Wis.]

H. L. SMITH,
Notary Public, Douglas County, Wisconsin.

My commission expires June 13th 1904.

[Endorsed:] Hill *vs.* McCord. Copy hereof served this 22nd day of April 1903 Sanborn Luse & Powell att'ys for W. E. McCord.

14 Know all men by these presents that we, John F. Hill as principal, and Wm. McKennon & Frank Hanzlik as sureties, each of Chippewa county, Wisconsin, are held and firmly bound unto Warren E. McCord in the full sum of one thousand dollars, to be paid to the said Warren E McCord, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this — day of April, 1903.

Whereas lately in the circuit court of the county of Douglas, State of Wisconsin, in a suit depending in said court between Warren E. McCord, plaintiff, and John F. Hill, defendant, a decree was rendered against the said John F. Hill, which decree upon appeal by the said John F. Hill therefrom has recently been affirmed by the supreme court of the State of Wisconsin; and the said John F. Hill having obtained a writ of error to reverse the decree in the aforesaid suit and a citation directed to the said Warren E. McCord, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the 18th of April 1903

Now, the condition of the above obligation is such, that if the said John F. Hill shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN F. HILL. [SEAL.]
WM. McKENNON. [SEAL.]
FRANK HANZLIK. [SEAL.]

Signed, sealed and delivered in presence of—
WM. A. HILL,
As to signature of John F. Hill.
J. F. STANLEY,
As to signature of Wm. McKennon, Frank Hanzlik.
W. H. STAFFORD.

15 STATE OF WISCONSIN, } ss:
Chippewa County, }

Wm. McKinnon & Frank Hanzlik each being first duly sworn, doth each for himself depose and say, that he is one of the sureties signing the above obligation; that he resides in Chippewa county, Wisconsin; that he is worth the sum of two thousand dollars in property not by law exempt from execution, over and above all his debts and liabilities.

WM. McKINNON.
FRANK HANZLIK.

Subscribed and sworn to before me this 13" day of April, 1903.

W. H. STAFFORD,
[SEAL.] *Notary Public, Chippewa County, Wis.*

My commission expires June 5, 1904.

STATE OF WISCONSIN, } ss:
Chippewa County, }

I, Charles Preston, clerk of the circuit court in and for the county and State aforesaid, do hereby certify that I am well acquainted with Wm. McKinnon & Frank Hanzlik, whose names as sureties are attached to the within bond, and further that they are each fully responsible for the amount of said bond.

Witness my hand and the seal of said court, at Chippewa Falls, in said county, this — day of April, 1903.

[SEAL.] C. E. PRESTON, *Clerk.*

I approve of the foregoing bond as to form and sufficiency of sureties. Dated April 18", 1903.

JOHN B. CASSODY,
Chief Justice.

16 [Endorsed:] Original. State of Wisconsin, — court, county of ——. Warren E. McCord, plaintiff, against John F. Hill, defendant. Filed Apr. 20 1903 Clarence Kellogg, clerk of supreme court, Wis. W. F. Bailey, attorney for —— ——, Eau Claire, Wis.

17 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to-wit, the thirteenth day of January, A. D. 1903.

Present: John B. Cassoday, chief justice, John B. Winslow, Roujet D. Marshall, Charles V. Bardeen, and Joshua Eric Dodge, justices.

CLARENCE KELLOGG, *Clerk.*

Be it remembered that heretofore, to-wit: on the thirtieth day of October, A. D. 1900, upon appeal from an order sustaining a demurrer to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action, the said order of the circuit court of Douglas county was reversed by this court and judgment was entered herein in the words and figures following:

18 Douglas Circuit Court.

WARREN E. McCORD, Appellant,
vs.
JOHN F. HILL, Respondent. } Opinion by Justice Dodge.

This cause came on to be heard on appeal from the order of the circuit court of Douglas county, and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this court, that the order of the circuit court of Douglas county, entered herein on the twenty-second day of June, A. D. 1900, sustaining the demurrer to the amended complaint herein, be and the same is hereby reversed, with costs against the said respondent taxed at the sum of ninety-eight and $\frac{25}{100}$ dollars ($98.25).

And that this cause be and the same is hereby remanded to the said circuit court, with directions to overrule the demurrer.

Chief Justice Cassoday and Justice Marshall took no part.

And thereupon this court, by Justice Dodge, filed its opinion in said cause, in the words and figures following, that is to say:

19 In Supreme Court.

WARREN E. McCORD, Appellant,
vs.
JOHN F. HILL, Respondent. } No. 57.

This was an action asserting full equitable title from the Government to the plaintiff and seeking to charge a trust upon the defendant, who had received the patent. The complaint is very long but may be abbreviated as follows: On Feb. 23, 1891, certain lands in the county of Bayfield were opened to entry. One Jacobus, under whom plaintiff claims, had settled on the land in question about January 28, 1891, and on the 23rd day of February aforesaid made application to enter the same which was rejected for the reason that the defendant had already made application therefor by a soldier's declaratory statement. Jacobus contested and after a trial and a decision in his favor by the officers of the land office, on appeal a decision was rendered by the Commissioner of the General Land Office on April 29, 1892, adjudging Jacobus to have been an actual settler prior to said 23rd day of February, and prior to the filing of

Hill's soldier's declaratory statement and therefore entitled under the law to make homestead entry. Upon those hearings the character of Jacobus' settlement and residence from about February 1st to the trial, May 11, 1891, was investigated and decided as a matter of fact. Hill's soldier's declaratory statement was ordered cancelled and the register and receiver were directed to allow Jacobus to enter the land. Time for appeal
20 from that decision having expired Hill's declaratory statement was cancelled and on July 7, 1892, Jacobus' entry allowed. Up to 1891 the law allowed a homesteader, at any time before the expiration of the five years required for continuous residence, to make due proof of his entry, settlement, occupation and improvement and to commute his homestead entry into a cash entry by paying the Government price of the land. This Hill did on the 20th of September, 1892, making proof of continued residence on the land for more than nineteen months, which proofs were received, and the receiver's receipt acknowledging payment of $400 delivered to him entitling him on presentation to receive a patent from the Commissioner of the General Land Office. In the month of December, 1892, Jacobus sold the land outright to the plaintiff and one McLeod. Subsequent to Jacobus' settlement on the land, about February 1st, 1891, but prior to his entry on July 7th, 1892, and to his attempted final proof, September 20, 1892, there had been enacted a law of March 3rd, 1891, providing as a condition for commutation that the proof must show residence and cultivation of the land for a period of fourteen months from the date of the *entry*. This act had not come to the notice either of Jacobus or of the officers of the local land office, but on the 15th day of May, 1893, the Commissioner of the General Land Office entered an order *ex parte* holding Jacobus' proofs of September 20, 1892, premature and insufficient because only about two months had then elapsed from the date of his entry and required that he then furnish supplemental proof showing residence and cultivation for the fourteen months' period subsequent to July 6th, 1892, which of
21 course could not be done, no matter how complete the residence, until September, 1893. On receipt of this information Jacobus consulted attorneys and was advised by them to have reconveyance made to him from McCord and McLeod and to resume his residence on the land in order to be able to comply with the requirement of the Land Department. Such reconveyance was made on the 1st of September, 1893, and followed by a mortgage from Jacobus to McCord and McLeod for the amount of the purchase price which they had paid to him and on or about September 20, 1893, the supplemental final proofs were offered. Thereupon, and about September 30, 1893, the defendant Hill, in the language of the complaint, "filed in the General Land Office certain affidavits setting up and claiming that said Jacobus did not settle upon or enter said land in good faith for the purpose of making it his home, but for the purpose of speculation, and that after he had made final

proof and commuted his homestead filing he sold the timber and the land, and had afterwards abandoned the land, and had abandoned the land for over six months prior to the date *date* of said affidavits, to-wit: September 30, 1893, and also filed with said affidavits the said deed from Jacobus and wife to said McCord and McLeod, and the said quitclaim deed from said McCord and McLeod to said Jacobus, and the said mortgage from said Jacobus to said McCord and McLeod, as hereinbefore stated. Thereupon and on the 19th day of December, 1893, in accordance with a letter of the Commissioner of the General Land Office of the 18th of November, 1893, a hearing was had on April 20, 1894, upon the questions raised by the contest and affidavits sub-
22 mitted by the said Hill and said hearing having been had before the receiver and register at Ashland, Wisconsin, the contestant Hill appearing in person and by his attorney, and the said Jacobus by N. B. Wharton & Son, his attorneys. Upon said hearing the contestant called witnesses and also was himself produced as a witness. None of such witnesses gave any testimony whatever except as to the possession, occupation and improvement of said land by the said Jacobus and his family. No proof was given on the part of any of said witnesses or the said defendant upon said hearing in any way tending to impeach the good faith of the entry of said Jacobus; all of said testimony relating to the question whether said Jacobus had actually resided upon said land. The said Jacobus called numerous witnesses upon said hearing. All of the said testimony related entirely and exclusively to the character of the possession, occupation and improvement of the said Jacobus upon said land, except the testimony of said Jacobus," which was to the effect that the continuation of residence after the conveyance to McLeod was in order to protect, as far as he was able, the title which he had in good faith sold. The complaint then continues: "The plaintiff shows to the court that no evidence was given tending in any way possible to show that the said Jacobus prior to his sale of said land to said McCord and McLeod had any contract with them or either of them, or with any other person or persons, to sell the said land, or tending in any way to show that he had made any contract or agreement that the title which he expected to acquire should inure to the benefit of any other person or persons except himself. No evidence was given that he had ever seen
23 or known the said McCord or McLeod prior to about the time of his conveyance to them, and not the slightest evidence was given in any respect tending to impeach the good faith of his said entry." After hearing upon this contest the register and receiver made their decision on August 9, 1894, of which the material part is as follows:

"On October 6, 1893, Hill filed an application to contest Jacobus on the ground that the entrymen never settled on the land in good faith, but for the purpose of speculation; that he did not reside on

the land during the six months next preceding the making of his final proof, and that he had sold the land to one W. E. McCord.

"Letter 'H' of November 18, 1893, directed this office to order a hearing on the charges.

"The two questions to be passed upon are:

"1. Did Jacobus abandon the land?

"2. Was the sale of the land to McCord and McLeod a bar to the offering of supplemental proof?

"Upon the first point the testimony of the witnesses is extremely conflicting. It is admitted by Jacobus that he worked at his trade in Superior and Iron River most of the time during his occupancy of the land, but it seems also fairly well established by the testimony of Mrs. Jacobus and numerous other witnesses that her residence was upon the land, barring certain absences on account of sickness and visits. Their cabin and its housekeeping equipment were superior to those of most homesteaders and the clearing, in extent and cultivation, compared favorably with that of others in the same neighborhood.

"After learning that supplemental proof would probably
24 be required, Mrs. Jacobus returned to the land in February, 1898, where she remained about a week, when she returned to Iron River and remained for some weeks while being treated for rheumatism. She made a brief visit to the cabin in March, went there again in the latter part of May, remaining two weeks, and returned for the same length of time in July. This was apparently her last stay upon the land until after supplemental proof was offered September 20. A small crop of vegetables and hay was raised that season as in the two years before.

"Upon the whole the residence of Jacobus upon the land was fairly satisfactory until after the offering of his first proof, but it is clear that his subsequent residence was for the sole purpose of enabling him to make proof in order to secure title for his transferees (pp. 178, 171).

"In December, 1892, about three months after making his premature proof, Jacobus sold the land to McCord and McLeod for a stated consideration of $4,250. September 1, 1893, the grantees named in the first instrument executed a quit-claim deed to same land and to Jacobus, the expressed consideration being $4,300.

"September 12, 1893, the day of making supplemental proof, Jacobus and wife executed a mortgage upon the land in favor of McCord and McLeod to secure a note for the amount of the stated consideration in the quit-claim deed for McCord and McLeod to Jacobus.

"The bare statement of facts points to the conclusion that the sale of the land in December, 1892, was absolute, and that the subsequent residence of Jacobus upon the land was as the agent
25 of the transferrees and for the purpose of acquiring title for them. This conclusion is strongly supported by the admissions of Jacobus upon cross-examination (pp. 168 *et seq.*).

"Jacobus, by the deed executed in December, 1892, divested himself of all right and title to the land; granting, therefore, that the reconveyance September 1, 1893, was made in good faith by all the parties, the slender residence by his wife, during the spring and summer of 1893, was not upon the homestead of Jacobus but upon the land in which he had no claim or interest, and the residence, such as it was, could not avail him in making supplemental proof. But we think all the circumstances—the time at which the conveyance from McCord and McLeod to Jacobus was made, the execution of the mortgage, and the evidence of Jacobus himself—show that the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for the benefit of his grantees. We are of the opinion, therefore, that Jacobus' supplemental proof cannot be sustained, and that the entry should be cancelled and a preference right of entry awarded the contestant Hill."

On appeal therefrom by Jacobus the following decision was rendered by the Commissioner of the General Land Office:—

"Register and receiver, Ashland, Wis.

SIR: On October 6, 1893, the plaintiff filed contest affidavit, alleging that said Jacobus did not settle upon or enter said land in good faith to make it his home, but for the purpose of speculation; that on September 20, 1892, defendant made final proof and
26 commuted, and within a short time sold the timber and the land, and wholly abandoned it; that he did not reside on the land during the six months next preceding the making of his final proof, but instead lived at Iron River; that defendant testified falsely in making his final proof.

"Hearing was ordered by office letter 'H'? of November 18, 1893, and was had with both parties present.

"August 9, 1894, you found for the plaintiff and recommended the cancellation of the entry.

"September 5, 1894, the defendant appealed, assigning several grounds of error.

"It appears from the records that on September 20, 1892, defendant was permitted to commute his homestead entry to cash entry No. 5534.

"By letter 'C,' of May 15, 1893, you were directed to require Jacobus to furnish supplemental proof, as said * * * commutation was premature.

"It is shown by the evidence that defendant had a small log house on the land; that it was well finished and well furnished; that he had about two acres cleared; that the improvements were worth about $200. He did not have any stock of any description, no chickens or other poultry; that on December 27, 1892, defendant sold said land to David McLeod and W. E. McCord for $4,250 cash.

"On the question of residence the testimony is very conflicting.

"Defendant's wife stayed on the land a part of the time and defendant worked in his barber shop in the town of Iron River, and stayed there nearly all the time working at his
27 trade; he made occasional visits to the land on the Sabbath day.

"It also appears that defendant rented three rooms in Iron River after he had sold the land, and he, with his wife, moved into them; that after defendant learned that he was required to furnish supplemental proof, because his commutation was premature, his wife moved back to the land, but defendant still remained in Iron River, making occasional visits to the land on the Sabbath and returning the same day. In reply to the question, 'Why was it that after you had made proof on the land and you believed the proof to be good, and you had sold the land, that you still continued your residence on it?' he answered, 'For the reason, as I stated, that I sold this land and if there was such a thing * * * I wasn't going to let the men that bought it from me be loser by it; I was going to make him all right; it wouldn't be much longer anyway, only five or six months, and we might do it and we wouldn't lose anything by it; we had nothing to lose and he had used us well, so I thought we ought to do it. * * * That was the reason and the only reason.' Plaintiff further testified that the land was reconveyed to him for the purpose of enabling him to make the proof; that it was to enable him to acquire title to it.

"In the case of Cann *v.* Connor, 4 L. D. 322, it was held that, 'After the submission of final proof and a hearing had thereon, additional time to show compliance with the law, though within the life of the filing, will not be granted in the presence of an adverse claim and where bad faith is evident.'

"The case of Alonzo W. Laird, 9 L. D. 527, is very similar to the one at bar. In that case it was held that, 'One who enters
28 with no intention of establishing residence in good faith and subsequently submits fraudulent final proof, cannot cure the wrong and acquire title to the land by returning to the same after said proof has been rejected and his entry held for cancellation.'

"In the case of Dougherty, 10 L. D. 79, the request of counsel for entryman to make a new entry was denied for the reason that he cannot make a homestead entry for the benefit of another, for the entry must be for his own exclusive use and benefit.

"The sale and conveyance of the land is clearly proven, and it is also as clearly shown that the land was reconveyed to defendant so that he could submit his final supplemental proof for the benefit of McLeod and McCord; hence your opinion is affirmed, and defendant's homestead entry and his cash entry for the land involved is held for cancellation.

"You will so notify the parties in interest and defendant of his right of appeal.

"Respectfully,

EDW. A. BOWERS,
"*Asst. Commissioner.*

"Upon appeal to the Secretary of the Interior and on the 28th day of April, 1896, the said Secretary affirmed the said decision of the Assistant Commissioner and confirmed his finding of facts."

The complaint then alleges the passage of the act of June 3rd, 1896, which, so far as material, is as follows:

"That whenever it shall appear to the Commissioner of the
29 General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs and legal representatives, as of the date of such final certificate of entry and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate; *provided* that this act shall not apply to commutation or homestead entries on which final certificates have been issued, and which have heretofore been cancelled when the lands made vacant by such cancellation have been re-entered by the homestead act.

"SECTION 2. That all commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement."

The complaint then proceeds to allege that at the time
30 of the passage of said act Jacobus' final certificate had not been cancelled nor the land become vacant nor been re-entered by any one, but that his final certificate of September 20, 1892, was then outstanding; that after the adoption of said act of Congress of June 3rd, 1896, and about July 1st, 1896, Jacobus made motion before the Secretary of the Interior for a review of his decision of April 28, 1896, affirming the decision of the Assistant Commissioner of January 23, 1895, and for confirmation of his entry on the ground that said Jacobus was fully within the act of Congress of June 3rd, 1896; that upon said motion the Secretary, by mistake of law, erroneously decided that Jacobus was not within the act of June 3rd, 1896, for the reasons set forth in the decision of the Assistant Commissioner of January 23, 1895; that the Secretary, by mistake and erroneously, held and decided that because Jacobus was unable to make supplemental proof after his commutation proofs had been made, he was thereby excluded from the provisions

of the act of Congress; that on the contrary it is the true intent and meaning of said act to allow commutation entries provided the claimant was entitled to make the same at the time of submitting his commutation final proofs, which were afterwards held by the department to be premature, and that said act in no manner depends upon facts occurring after the submission of commutation proofs in any case; "that it was never held by any of the officers of the General Land Office or the local land office or of the Department of the Interior in any of said proceedings, that the said Jacobus was not an entryman in good faith of the said land, or that there was any defect or fraud
31 whatever in his entry of said land or in his final or commutation proof thereof; but the only fact which was ever held against the said Jacobus in said proceedings was that by reason of having conveyed said land after he had obtained said final certificates to the plaintiff and said McLeod, he was therefore precluded from making supplemental proof as required by the Commissioner of the General Land Office, which supplemental proof became immaterial and unnecessary under the act of June 3, 1896; that the said office decision of January 23, 1895, did not find any fraud or lack of good faith on the part of said Jacobus, but simply found and held that because he had sold the land after receiving his final certificate, that he could not make supplemental proof, and the plaintiff submits that the decision of January 23, 1895, was correct, inasmuch as the said Jacobus did not then own the land, and if the title of said Jacobus depended entirely upon his ability to make such supplemental proof, he or his grantees could never have obtained a patent of said land; but inasmuch as it was found and determined by the Land Department through all the stages of said proceedings that he was an entryman in good faith, that his entry was entirely satisfactory down to the time of making final proofs, he was therefore brought clearly within the act of June 3, 1896, and the Secretary of the Interior by error of law improperly and unlawfully excluded him from the benefits of that act."

The said decision of the Secretary of August 4, 1896, is in the words and figures following, to-wit:

"The Commissioner of the General Land Office.

SIR: Phillip W. Jacobus, through his attorneys, has filed
32 a motion for review of departmental decision of April 28, 1896, wherein is affirmed the action of your office in holding for cancellation his homestead and cash entries for the N. W ¼ of sec. 17, T. 48, N. R. 8 W., Ashland district, Wisconsin; also a motion to confirm said entries under the provisions of the act of Congress approved June 3, 1896.

"The applicant, in his motion for review, alleges that his case is in all respects similar to that of Herbert H. Augusta (on review, 21 L. D. 200), wherein it was held that a commuted homestead entry may be equitably confirmed if after its allowance the land

was sold to a purchaser in good faith, and fourteen months' residence was thereby rendered impossible.

"The very essence of the decision confirming the entry in that case, however, was the evidence of good faith on the part of the entryman. The evidence in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent, as fully set out in your office decision of January 23, 1895.

"It is likewise impossible to confirm the entry under the provisions of the act of June 3, 1896, for the same reason, namely, the practice of fraud in making proofs.

"Both the motion for review and the motion to confirm are accordingly denied.

"The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*"

The complaint then alleges entry by Hill on September 7th, 1896, and issue of patent to him, reconveyance by Jacobus to
33 McCord and McLeod on Oct. 31, 1896, and quit-claim by McLeod to McCord.

As a separate ground of recovery the complaint also alleges that after the issue of the receiver's receipt to Jacobus in September, 1892, to-wit, in or about December, 1892, the plaintiff and McLeod, being then in negotiation for the purchase of the land from Jacobus, had an interview with the defendant Hill, in which the latter stated to them that he did not have and would not make any claim to the said land, that he had been fairly beaten in his contest with Jacobus, and that if the plaintiff and the said McLeod would buy the land he would make no claim to it; that plaintiff and McLeod relied on such statements and made the purchase from Jacobus for $4250, which was actually paid; that thereafter and about January 4th, 1893, for the purpose of putting the understanding between the plaintiff and said Hill in writing the parties entered into the following written agreement:

"For the purpose of making a settlement with John F. Hill, and his relinquishment on the N. W. ¼ of section 17, town 48, range 8 W., we hereby make him a present of a certain lot of logs, now skidded on said land, and give him permission till the 1st day of May, 1893, in which to enter on said land to remove said logs, and to occupy the house on said land and to remain on said land until that date, but not thereafter. Said logs amount to about 30,000 feet, and he agrees not to cut nor allow any of his men to cut or destroy any other timber. And in consideration of said logs, I, John
34 F. Hill, being duly sworn, on oath says that *he is* the man that made a soldier's application for said N. W. ¼ of 17–48–8 W., and I make this affidavit for the purpose of relinquishing all my right, title and interest in and to said claim, which I do unto the

United States. Signed, sealed and delivered and agreed upon this 4th day of January, 1893.

In presence of
W. H. PACKARD.
TRACY LYON.

DANIEL McLEOD.
W. E. McCORD. [SEAL.]
JOHN F. HILL. [SEAL.]"

Upon this foundation it is claimed that Hill is estopped from now claiming or holding the land against the plaintiff. From an order sustaining a general demurrer to the complaint the plaintiff appeals.

35 DODGE, *J.*:

1. The general rules of law governing the controversy here presented are well settled and not seriously controverted. They may be summarized as follows: The United States land laws as between individuals are deemed to be largely self-executing. If those laws confer a right to the land upon the existence of certain facts then that right arises when the facts are found to exist by the proper officers of the Government. The ascertainment of the facts upon which the land laws are to act is vested in the executive branch of the Government and in that particular department presided over by the Secretary of the Interior and under him by the Commissioner of the General Land Office. When such facts are ascertained and decided by the executive officers the rights of the parties are those conferred by the law. If therefore the Secretary of the Interior issues to one person a patent when upon the facts decided by him another party is entitled to the land ultimate rights will not be changed thereby but the holder of the patent will by the courts be considered to hold in trust for him to whom the land in equity belongs. Moore *v.* Robins, 96 U. S. 530; Marquez *v.* Frisbie, 101 *id.* 473, 476; Lee *v.* Johnson, 116 *id.* 46; Sanford *v.* Sanford, 139 *id.* 642; Stewart *v.* McHarry, 159 *id.* 643; Parsons *v.* Venzke, 164 *id.* 89; Hawley *v.* Diller, 20 Sup. Ct. Rep. 986.

In this case it is claimed that upon the facts found and decided to exist by the executive officers Jacobus became, by virtue of the act of June 3rd, 1896, vested with the right to the land,—complete equitable ownership thereof; that the refusal of the Secre-
36 tary of the Interior to recognize this right and his decision permitting the defendant Hill to enter upon the land and awarding him a patent therefor were mere mistakes of law and ineffectual save to confer ostensible legal title upon Hill, which can rise no higher than that which the Government then had, namely, a naked legal title in trust for Jacobus, the true owner, or his assigns. Wisconsin Ry. Co. *v.* Price Co. 133 U. S. 496, 506.

The question before us on this complaint is whether it appears clearly and without substantial doubt that the facts entitling Jacobus to the land not only existed but were decided to exist by the executive officers and that the action of the Secretary was predi-

cated not upon a decision of facts adverse to that claimant but upon a misapplication, or mistake, of law to the facts already decided to exist. It is claimed that the complaint shows, by facts specifically alleged and by the unavoidable construction of the various executive decisions contained therein, that up to June 3rd, 1896, it had been decided that Jacobus had duly entered the land, had prior to September 20th, 1892, resided thereon in compliance with the homestead laws for a period of more than fourteen months, and had made an honest proof of such settlement, residence and entry, paid his money on commutation and received the receiver's certificate therefor, constituting full paper evidence of complete equitable title; that the local land officers' findings of these facts were in no wise challenged but impliedly confirmed by the Commissioner's *ex parte* order of May 15th, 1893, which pointed out that, conceding such facts to be true, still by reason of a law, of which neither
37 Jacobus nor the land officers had actual knowledge, it had been made necessary that there should have been fourteen months of residence after the *entry*, as distinguished from the settlement, whereas his residence, as appeared on the face of the papers with no attempt at concealment, had only been a little over two months after such entry, whereby it resulted that the reception of the proofs and the issue of the receiver's receipt had been premature by nearly one year.

It is inferrable of course from the act of June 3rd, 1896, that there were other cases of this sort, for that act was general and undertook to provide that they who had duly entered and occupied the land, whose proof, if not characterized by any fraud, had been duly received in disregard of the act of 1891 and the only defect in which was its prematureness, should be the owners of the land provided their entries had not prior to the act been cancelled and no one else had entered. Clearly if Jacobus had done nothing after making his proofs in September, 1892, and his entry had remained without formal cancellation, he would have been entitled to confirmation thereof and to his patent upon the passage of this enactment. He did, however, take further steps and attempted in September, 1893, when fourteen months from his entry in July, 1892, had elapsed, to prove residence in good faith for his own benefit up to that date as the then existing law required. In this he could not but fail, for relying on his supposed complete title he had sold the land and abandoned his residence upon it. This fact was concealed in the affidavits whereby he attempted to make his later proof and
38 on trial those proofs were held to be fraudulent and he refused the land although the final cancellation of his patent had not then taken place.

Following the act of 1896 and by reason of it Jacobus made application for confirmation of his certificate of entry made in 1892, which it was claimed satisfied all the conditions of this act, thus practically ignoring the subsequent steps. The Secretary of the Interior denied that application by reason of "the practice of fraud

in making proofs." It is conceded by the appellant on the one hand that if upon any evidence the Secretary found fraud to exist as a fact in the premature proofs made in September, 1892, then his decision is final and he was justified in refusing Jacobus his patent under the act of 1896. But if he intended only to decide that fraud had been practiced in the proofs presented in September, 1893, then he made a mistake of law, for the reason that the good faith of such subsequent attempt to make proofs was not essential to Jacobus' right to a confirmation of his certificate of entry and to a patent under the act of June 3, 1896, such proofs being immaterial to that right. The question is, therefore, reduced to the somewhat simple one of the construction of Secretary Smith's ruling of August 4, 1896. It must not be forgotten in approaching that question that this one order was made upon two motions,—one was the motion to review his previous decision made April 28th, confirming the action of the Commissioner of the General Land Office in denying Jacobus the privilege of making proofs in 1893. That was overruled,
39 as the Secretary states, for the reason "that the entry was not made in good faith and the proof submitted by the entryman was fraudulent, *as fully set forth in your office decision of January 23, 1895.*" Of course that decision related to the proof which was before the Secretary for consideration and not to a previous proof held of no avail because tendered and received before the land officers had any right to receive it as the law then existed.

We have carefully examined all of the preliminary proceedings and controversies as set forth in the complaint and are constrained to the conclusion that the proofs and only proofs referred to by the Secretary in this order as permeated by the practice of fraud were the same proofs which the Commissioner had found fraudulent and the Secretary as well in affirming the Commissioner's decision. It is hardly necessary in this opinion to go over the whole of this ground. The principal considerations are, however, that up to the time of the motion on which this order of August 4th passed, no question had been presented, litigated or discussed as to fraud in any proofs save those which were tendered in September, 1893, and it sufficiently appears from the complaint that the action of the Secretary, both that of April 28, 1896, and August 4, 1896, was predicated on the record which had come to him from the district land officers through the Commissioner for review. It must be remembered that the officers of the Land Department, either the local land officers or the Commissioner or both, had already decided, first that the settlement and residence up to the time of the entry, namely, from February 1, 1891, to July 6,
40 1892, were *bona fide* and satisfactory; again, in September, 1892, that such residence as the law requires had continued and that the entry, the proofs and the application for commutation to a preëmption entry at that time were *bona fide*. This conclusion, upon facts reached by the land officers, was in no wise impugned

by the order of the Commissioner made in May, 1893, to the effect that such proofs could not be considered for that the new law had required a residence of fourteen months after the entry, which time had not elapsed. Then came in September, 1893, the attempt to offer proof of continuous residence by Jacobus as a homesteader up to that time, that is, through the year from September, 1892, to September, 1893, when confessedly during that year Jacobus had sold out and gone off the premises and when it was conceded that his attempt to resume occupation thereof under the guise of a return to him of the title was not with a view to making a homestead for himself but for the purpose of protecting the title of his grantee, a purpose meritorious enough *inter partes* but fraudulent as to the Government. Here came the protest by Hill, which attacked the good faith of Jacobus' entry and alleged the facts with reference to abandonment, conveyance, removal and reconveyance. No suggestion in this protest was made that the original proofs offered and accepted in September, 1892, were characterized by any fraud or fraudulent practice and no issue as to the *bona fides* of Jacobus in tendering those proofs was presented. Now while it is doubtless within the power of the Commissioner of the General Land Office and of the Secretary of the Interior to
41 extend their examinations beyond the issues which may be formed by a protest, it is said in Lee *v.* Johnson, *supra*, that such practice is not common and we think it clearly appears from the context and language of the decisions of the local land officers, the Commissioner and the Secretary that no such extension was made in this case. From the record set forth it appears that the local officers persisted in the conclusion already reached by them,—that the residence of Jacobus up to the time of allowance of his first proofs was satisfactory. They, however, point out the acts subsequent to that time which clearly established the fraudulent character of the proofs of September, 1893, from the Government's point of view, and recommend cancellation of the whole proceeding by reason of that fraud. This is the view which it seems to us the Commissioner of the General Land Office adopted. In the light of the record on which he was passing, the language is adaptable to that view and to no other and the fraud in the proofs then tendered and under consideration for acceptance was an abundant reason for refusing them and thereby, as the law then stood, justified final action invalidating Jacobus' claim to the land *ab initio*. Had that conclusion been carried into effective judgment by a cancellation of his entry it would have been justified, would have been final and he would have been entitled to no relief under the act of June 3rd, 1896. The ultimate rendition of judgment, however, had been postponed, so that his rights were still unadjudicated, though
42 decided, when the act of 1896 came in and declared that they should be adjudicated upon the proof made in September, 1892, unless in making *such* proof fraud had been practiced.

It is therefore entirely clear that the proofs first mentioned in the Secretary's order of August 4, 1896, as those which had been held fraudulent in the Commissioner's decision, brought up and already affirmed on appeal, were the proofs of September, 1893, and the mere reading of the order leaves us in no doubt that he referred to and intended the same proofs in the latter part of the same order. Certainly no one could pass from consideration of the last proofs, affected as they were by events and acts peculiar to themselves, to those of the year before which, if fraudulent, must have been so found upon wholly different reasoning, without noting in his order the very marked distinction and antithesis which must have been present to his mind. It is inconceivable that the Secretary, after brusquely reaffirming the former decisions of his subordinates as to the 1893 proofs, should turn to those of 1892 and *reverse* the holding of the same subordinates thereon, in such phraseology as that used by him. Whether the Secretary overlooked the fact that there were two sets of proofs and assumed that Jacobus' claim to confirmation and patent under the act of June 3rd, 1896, was dependent on the *bona fides* of the same proofs as was his application for confirmation and patent previously considered, or whether having the situation correctly in mind he decided as matter of law that fraud in the 1893 proofs would preclude him from benefit of his 1892 proofs under the new law, is perhaps not certain. Either mental attitude
43 is such mistake as precludes the idea that he passed on the question of fraud in the proofs of September, 1892, as a fact and such mistake as can be reviewed and corrected by the courts. We reach the conclusion, therefore, that the complaint with sufficient certainty shows that Jacobus was denied his patent because of fraud in a transaction which under the law could have no effect upon his right thereto; that, as a result, the issue of patent to Hill conveyed only the title which the United States then had, namely, a bare legal title in trust for Jacobus, in whom the act of June 3rd, 1896, had vested full equitable title, and that the complaint states a cause of action to charge Hill with such trust in favor of plaintiff.

Respondent urges strenuously that the allegations of the complaint,—that no evidence was offered tending in any way to impeach the good faith of the entry of Jacobus or tending in any way to show any purpose on his part to make the sale which, after the issue of his final certificate, he did make,—are merely conclusions and cannot suffice to render it sufficiently certain that evidence on that subject was not presented and considered and that it is the duty of the plaintiff to set out all of the evidence in order that the court can draw its conclusions instead of accepting those of the pleader. This contention imposes too strict a rule for pleadings. Doubtless no judgment can go repudiating the conclusion reached by the executive department of the United States without full and clear proof of their mistake of law, but under our statute the
44 complaint shall consist of "a plain and concise statement of the facts constituting the cause of action" (§ 2646 R. S.)

and is to be liberally construed (§ 2668 R. S.). Under these provisions it is sufficient for plaintiff to allege as a fact the absence of any testimony or proofs on a given subject, which allegation we think must be accorded literal effect upon demurrer, leaving the plaintiff to make proof thereof according to the ordinary rules of evidence.

2. The plaintiff makes further contention that certain representations and agreements on the part of Hill estop him from making any claim of title under his patent from the United States. In view of the grounds upon which we have reached it, the foregoing conclusion as to the force of the action of the Interior Department seems to us conclusive against this contention. We have held that the refusal of title to Jacobus was based entirely on facts occurring subsequent to Hill's representations, those facts being: Jacobus' conveyance of the premises to the plaintiff, his abandonment thereof, and his fraud upon the Government in attempting to revest himself with title and to make affidavit that after such conveyance he continued to occupy for himself. Hill at most could only estop himself by declaration of existing facts except so far as he may be said to have entered into a contract performance of which might be indirectly enforced by holding him estopped from breaking it or from claiming the fruits of its breach. The allegations of the complaint on this subject are well summarized in respondent's brief as follows: Hill stated to appellant,
45 first, that he did not have any claim to the land; second, that he would not make any claim to the land; third, that he had been fairly beaten in his contest with Jacobus; fourth, that if appellant bought the land from Jacobus, Hill would make no claim to it, and fifth, relinquish all his claim to the land to the United States. Of course any declaration made by Hill as to his then existing lack of title to the land could not estop him from subsequently acquiring and insisting upon a new and independent title not then claimed by him and not inconsistent with his declaration. 2 Pomeroy Eq. § 813; Bushnell *v.* Scott, 21 Wis. 457. Whether his assertion that he had been fairly beaten in his contest with Jacobus would estop him from assailing the good faith of the latter's entry or commutation proof which had already been made, it is immaterial to decide, in view of the conclusion reached that that question was not considered and had no weight in bringing about the reclamation of the land by the United States. If when the evidence is fully in it shall be found that such assault on Hill's part was effective, a different question may arise, but for the purposes of the present discussion we may drop that assertion from view. None of his other declarations or promises are inconsistent with the claim which Hill now makes. He may well concede that he then had no claim to the land and that he would not assert any claim which he then had to it if the appellant purchased it, and that he did in fact relinquish to the United States all claim which he then had; his present title

may nevertheless stand, for as we have held to appear by the
46 complaint, the United States took the land away from Jacobus, not because of any claim which Hill had and not because of any facts which existed at the time of Hill's representations, but because of acts performed by Jacobus afterwards. Hill's present title is predicated not upon any claim that he then had, but upon the fact that he by his protest brought to the attention of the United States Jacobus' subsequent conduct and in consideration thereof was given the privilege to purchase the land from the United States as a new and independent transaction. The conduct of Hill, therefore, so far as stated in the complaint, cannot estop him from asserting the validity of the title acquired by his patent if it should ultimately be held that Jacobus' rights were properly cancelled and destroyed, unless indeed that were done upon the ground of facts existing at the time of the representations and denied thereby.

By the COURT: Order of the circuit court reversed and cause remanded with directions to overrule the demurrer.

Chief Justice Cassoday and Justice Marshall took no part.

47 And afterwards, to-wit: on the twenty-second day of November, A. D. 1900, a motion for rehearing in said cause, was filed by the said respondent, in the words and figures following, that is to say:

STATE OF WISCONSIN:

In Supreme Court.

WARREN E. MCCORD, Plaintiff and Appellant,
vs.
JOHN F. HILL, Defendant and Respondent.

And now comes the defendant and respondent, John F. Hill, and moves the court for a rehearing of the cause above entitled, and a review of the issues and questions involved therein, and of the decision of this court heretofore rendered herein.

A. B. ROSS,
Attorney for Respondent.

W. F. BAILEY, *Of Counsel.*

(Endorsed:) State of Wisconsin, in supreme court. Warren E. McCord, plaintiff *vs.* John F. Hill, defendant. Motion for rehearing. Filed Nov. 22, 1900. Clarence Kellogg, clerk of supreme court, Wis.

48 And afterwards, to-wit: on the first day of February, A. D. 1901, the same being the tenth day of said term, the following proceedings were had in this court, in said cause, that is to say:

Douglas Circuit Court.

WARREN E. McCORD, Appellant,
vs.
JOHN F. HILL, Respondent.

The court being now fully advised of and concerning the motion of the said respondent for a rehearing herein, it is now here ordered and adjudged by this court, that said motion be and the same is hereby granted, provided, however, that re-argument shall be confined to the following questions, viz:

First. Whether, as conditions precedent, to the confirmation of Jacobus' certificate of entry under the act of June 3, 1896, application to the Commissioner of the General Land Office, proof of the necessary facts before him and findings thereon by him, or either of those proceedings, was made essential.

Second. Whether the six months' actual residence in good faith by the homestead entryman prior to the commutation, required by said act of June 3, 1896, was required to be subsequent to the date of entry.

Third. Whether at the date of said act, June 3, 1896, Jacobus' entry had been cancelled and the land in question had been re-entered by the homestead act.

Fourth. Whether the rights now claimed by the respondent are such that he is estopped to set them up against the appellant.

49 And afterwards, to-wit: on the twenty-sixth day of September, A. D. 1901, the same being the twelfth day of said term, the following further proceedings were had in this court, in said cause, that is to say:

Douglas Circuit Court.

WARREN E. McCORD, Appellant,
vs.
JOHN F. HILL, Respondent.

And now at this day came the parties herein by their attorneys, and this cause having been re-argued by Messrs. A. L. Sanborn and L. K. Luse for the said appellant, and by W. F. Bailey, Esq. for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

50 And afterwards, to-wit: on the fifteenth day of October, A. D. 1901, the same being the fourteenth day of said term, judgment was rendered in said cause, by this court, in the words and figures following, that is to say:

Douglas Circuit Court.

WARREN E. McCORD, Appellant,
vs.
JOHN F. HILL, Respondent.
} Opinion by Justice Dodge.

This cause came on to be heard on re-argument granted by the court, and was argued by counsel. On consideration whereof: it is now here ordered and adjudged by this court, that the order of the circuit court of Douglas county, sustaining the demurrer to the amended complaint herein, be and the same is hereby reversed, with costs against the said respondent taxed at the sum of one hundred and twenty-nine and $\frac{75}{100}$ dollars ($129.75).

And that this cause be and the same is hereby remanded to the said circuit court, with directions to overrule the demurrer.

Justice Marshall took no part.

And thereupon the court, by Justice Dodge, filed its opinion in said cause, in the words and figures following, that is to say:

51 WARREN E. McCORD, Appellant,
vs.
JOHN F. HILL, Respondent.

On rehearing.

DODGE, *J.*:

I. The first question submitted for re-argument, namely, whether, as conditions precedent to the confirmation, under the act of June 3, 1896, of Jacobus' previous commuted pre-emption entry, there was necessary an application to the Commissioner of the General Land Office and proof of the necessary facts before him and finding thereon by him, is predicated upon the first clause of the act of June 3, 1896, "Whenever it shall appear to the Commissioner of the General Land Office that" &c. The doubt suggested by these words as pressed upon us in the motion for rehearing, was whether the purpose of Congress was to create the Commissioner of the General Land Office a special tribunal to pass upon the existence of the necessary facts for relieving certain applicants for public lands from the effect of the act of March 3, 1891; or whether it was intended merely to provide *in pari materia* with the other land laws for an examination and decision of these questions by the Land Department, presided over by the Secretary of the Interior, and in which the Commissioner of the General Land Office and all other officers are but subordinates of the Secretary of the Interior and exercising one or another of the functions of that department subject to direction, control and supervision by the Secretary. It is well

known that in 1820 Congress for the first time attempted something like general legislation which should affect and regulate the management and disposal of the then considerable public domain, which had been derived from various sources and was obviously to
52 increase vastly in extent and value. Since then, legislation has been almost as frequent as the sessions of Congress; some of it scientific and deliberate, but much of it seemingly accidental and aimed at special details. Many of these acts, if construed according to their exact words, would have been subversive of certain phases of the obvious general policy of Congress with reference to this important subject; and in this field perhaps more than almost any other of congressional legislation, the construction placed upon the land laws from time to time enacted, both by the department and by the courts, has been that they were intended merely to be added to and become a part of a consistent system of legislation, and as enacted one by one, were, so far as possible, to fall under and be controlled by those general provisions and regulations evidently intended to cover the whole field. A comparatively late illustration of this view is presented in the case of The United States *v.* Healey, 160 U. S. 136, but there are many others which might be cited.

Since the incorporation of the Land Department into the Interior Department, whereby the whole business of the former was placed under the supervision and control of the Secretary of the Interior, there has been no element of the policy of Congress and of the public land system more prominent than that the Secretary of the Department of the Interior should be the responsible head thereof; that through and by him spoke and acted the Government of the United States with reference to the public domain, and an act which substituted some subordinate of his as the responsible and final representative of the Government, free and independent of the Secretary's control, would be a most startling innovation. It is, therefore. not surprising that we find that the act of 1896 under discussion was promptly assumed by the Interior Department to be
53 but one more of the many laws directing the conduct of the Land Department, to be controlled in its execution by the general policy above outlined, whereby the Commissioner exercised no more absolute power or discretion than he did generally with reference to the conduct of the land business. On July 9, 1896, about one month after the enactment of the law, we find the Commissioner, having first obtained the approval of the Secretary, promulgating regulations for the execution of this act, by a circular published 26 Land Dec. 544. This circular provided that in certain cases then pending, no application to any officers need be made, but that the General Land Office would at once take them up for consideration without application. As to other cases, it was provided that application should be made, not to the Commissioner as a responsible and special tribunal, but, as in the case of all other land matters, to the local land officers, who should examine and report thereon as upon other applications, not to the Commissioner, but to

the General Land Office. This circular, while emanating from the Commissioner of the General Land Office, did not purport to emanate from him as the source of authority, but, in accordance with the usual practice of the Land Department, bore upon its face the sanction of the approval of the Secretary. It was wholly inconsistent with the understanding that the establishment of rights under the act of 1896 was intended to be treated otherwise than the rights of other applicants under the general system of public land laws. Two instances are cited to us by counsel of the treatment of applications under this law in exactly the same manner as other applications for land, in that the power of the Secretary of the Interior to supervise, regulate and control, is recognized and exercised. *In re* Hasselquist, 24 Land Dec. 351; Kuepper *v.* Tripp, 26 *id.* 561. To these may be added Jacobus' own application, over which the Sec-
54 retary unhesitatingly took jurisdiction, without a thought that a new tribunal exclusive of himself had been vested with that authority. We find nothing to indicate that the line of construction thus adopted in the department has ever been varied, and these decisions, commencing at about the time of the passage of the act and continuing thereafter, are of course very cogent in its construction. United States *v.* Healey, *supra.*

In the case of Buena Vista County *v.* I. F. &c. R. R. Co., 112 U.S. 165, an act of Congress provided, "That the Commissioner of the General Land Office is hereby authorized and required to receive and examine the selections of swamp lands * * * and allow or disallow said selections and indemnity provided for," &c. A decision by him under such act was reversed by the Secretary of the Interior, and in the suit it was contended, as by the respondent here, that the decision of the Commissioner was intended to be final and not appealable to the Secretary. This contention was overruled, the court saying, "There is nothing in the act which alters the relation between the two officers as otherwise established, or puts the decisions of the Commissioner, under that act, upon a footing different from his other decisions."

In Knight *v.* Land Ass'n, 142 U. S. 161, the question of the relation of the Secretary to the execution of the land laws, not only those existing at the time his general authority was defined, but such as might be thereafter enacted, was exhaustively discussed by Lamar, J., who shortly before had been Secretary of the Interior. That discussion is so exhaustive and the citation of statutes, precedents and illustrations so complete as to render further enlargement now unnecessary. The views there expressed are further supported by Orchard *v.* Alexander, 157 U. S. 372; Parsons *v.* Venzke, 164 *id.*
89; Warner Valley S. Co. *v.* Smith, 165 U. S. 28; *Re* Sweayze,
55 5 Land Dec. 570; 17 Op. Att'y Gen. 205.

In the light of the rules for construction of the land laws promulgated by these decisions of the Supreme Court of the United States and the practical construction given to the act of 1896 by the executive officers, we cannot doubt that it was intended to be car-

ried out under the direction and supervision of the Secretary of the Interior. While he might and generally did require that rights claimed under it should first be submitted to the officers of the General Land Office, he did not thereby preclude himself from assuming direction and supervision upon direct application to himself, waiving such preliminary steps. In such case his decision was the ultimate and final one of the executive branch of the Government.

II. The second question submitted for argument was whether the words, "Whenever it shall be made to appear * * * that there was at least six months' actual residence in good faith by the homestead entryman prior to such confirmation," &c., required that such residence should be after the entry. Obviously there is nothing in the words themselves to express such requirement, unless it lurks in the word "entryman." The suggested argument is that residence by an entryman can only exist after entry; before that claimant is not an entryman. This contention gives to that single word extraordinary force as a limitation, and we should be slow to believe that statute-makers used it for that purpose unless such intention were confirmed by context or other considerations. The word entryman may quite as naturally have been used merely to describe such person as was entitled to the benefit under the act of 1896. To be entitled to confirmation thereunder one must have been a homestead entryman. We find the word thus used elsewhere in the same statute more than once; that is, as merely descriptive of the persons to
56 whom that act applies. If used in the same sense in the clause under consideration, it would only require six months' residence by that person. That the same word is used in the same sense when repeated in a law is ordinarily to be presumed, unless a different purpose is plain. We can discover no reason, either in context or in the purpose of the legislation, to avert that presumption. On the contrary, we think that it is merely an adoption into this particular statute of a rule of the General Land Office which for many years had been applied to pre-emptors, whereby, in excess of the statutory condition for acquiring title, they were required to have resided in good faith upon the land for at least six months before pre-emption certificate could issue. Since this requirement was not statutory, the act of 1896, giving to homestead entrymen the same rights to pre-emption prescribed *by law* for those originally applying as pre-emptors, might have been construed as waiving this requirement for six months' residence in good faith prescribed only by regulation. It seems obvious that the clause in question was interpolated merely to avoid this result and to require of homestead entry as a condition of commutation into pre-emption, the same six months' residence in good faith as the regulation had previously imposed on all others; which residence had never been required to be subsequent to entry, but merely prior to final proof.

Another reason is now urged by appellant why the clause making right to confirmation under the act of 1896 dependent on six months' actual residence should not exclude the plaintiff, even if such resi-

dence must be subsequent to entry. That reason is that, as appellant now claims, his entry took place when he filed the necessary papers and paid the fee in February, 1891. He cites authorities seeming to sustain the position that the date of an entry of land is when the applicant having the right to enter completes all
57 of the acts required of him to effect that result; that delay of the land officers to note on their books such entry cannot affect his rights, whether such delay results from hearing and deciding a contest or from any other cause. Chotard *v.* Pope, 12 Wheaton, 586; Lytle *v.* Arkansas, 9 How. 333; Shepley *v.* Cowan, 91 U. S. 330; 3 Land Dec. 42, 4 *id.* 463; 12 *id.* 324 and 643; 17 *id.* 209; 19 *id.* 562. Since we have decided that the six months' residence is not required to be subsequent to entry, we do not need to pass upon this contention of appellant. If we should adopt this view, it would not change the result. We therefore consider that we ought not to pass on it, for its decision might sustain plaintiff's right to the land independently of the acts of 1891 or 1896. In that respect it is an entirely new proposition, presented for the first time upon a rehearing limited by our order so as not to fairly include it, so that respondent cannot be said to have had reasonable opportunity to meet it. On the original argument of this case no question was raised as to the correctness of the Commissioner's ruling that Jacobus' entry was of date July 6, 1892, and our consideration of the case proceeded upon assumption of such correctness. As the question was not raised or argued by counsel, so it was not considered or decided by the court. The several references in the former opinion to July 6, 1892, as the date of entry are to be construed, not as a decision of that fact, but merely as assumption of a premise from which the discussion of other questions proceeded.

III. The first part of the third question re-argued we deem unnecessary of decision for the purposes of this case. Examination of various decisions of the Land Department of the United States and of Federal courts leaves much confusion and doubt whether an order of the Commissioner of the General Land Office that an entry be "held for cancellation" effectively cancels it if an appeal is
58 taken therefrom, or whether its efficacy as a judgment of cancellation is complete only upon the expiration of the time for appeal without that right being exercised, or, if exercised, upon final affirmance by the Secretary of the Interior and communication thereof to the Commissioner, followed by formal order of cancellation. There seem to be decisions and dicta supporting the different theories. Johnson *v.* Walton, 11 Land Dec. 278; McDonald *v.* Hartman, 19 *id.* 547; *Re* Northern Pacific Ry., 20 *id.* 191; *Re* Hasselquist, 24 *id.* 351; Germania Iron Co. *v.* James, 89 Fed. R. 811; S. C., 107 *id.* 597. Since the effect of such acts must largely be ascertained by the holdings of the department and ultimately by decision of Federal courts, we deem it unadvisable to declare our view thereon unnecessarily. We therefore withdraw the statement in our former opinion bearing on completed cancellation, as follows:

"The ultimate rendition of judgment, however, had been postponed so that his rights were still unadjudicated, though decided, when the act of 1896 came in, and declared that they should be adjudicated upon the proof made in September, 1892, unless in making such proof fraud had been practiced." We say that completeness of cancellation of plaintiff's entry is immaterial and unnecessary of decision because his right to confirmation under the act of 1896 was by the terms of that act defeated only in case there had been both cancellation and re-entry under the homestead act prior to June 3, 1896, or prior to application for confirmation, and the complaint clearly asserts that no re-entry had taken place. It not only categorically and in terms negatives such event, but also alleges that Hill's entry did not take place until September 7, 1896. This would seem conclusive upon demurrer that this call of the statute had not been complied with, but counsel for respondent urge that Hill had acquired a "preference right of entry" at some earlier date, which should be
59 deemed that of his re-entry. Careful examination of the complaint discloses no such allegation, but if we should infer from the fact that Jacobus' attempt to make second commutation was defeated upon Hill's contest and that the latter afterwards entered, that such entry was allowed by reason of preference right based on his contest, still the existence of such preference right is not an entry nor a re-entry within the words of the act of 1896. Such right is a mere privilege to enter and in no sense an entry. Sec. 2, ch. 89, Laws 1880 (21 Stat. at Large, 140); *Re* Hendrickson, 13 Land Dec., 169; *Re* Davis, 19 *id.* 489. Hence we conclude that whether cancellation had or had not taken place, there certainly had been no re-entry and plaintiff was not within the terms of the proviso to the act of 1896 so as to preclude him from right to confirmation under it.

After full consideration of all the reasons urged, we find none to lead us to recede from the decision formerly declared. It is therefore unnecessary to consider whether, if any of such reasons had been sustained, estoppel might successfully be invoked against respondent in urging them.

By the COURT: Order of the circuit court reversed and cause remanded with directions to overrule the demurrer.

Justice Marshall took no part.

60 And afterwards, to-wit: on the twenty-ninth day of November, in the year of our Lord one thousand nine hundred and two, came into the office of the clerk of the supreme court of the State of Wisconsin, John F. Hill, and filed in said court his certain notice of appeal and undertaking, according to the statute in such case made and provided, and also the return to such appeal of the clerk of the circuit court of Douglas county, in said State, in the words and figures following, that is to say:

61 In Circuit Court, Douglas County.

WARREN E. McCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

To Sanborn, Luse & Powell, attorneys for said plaintiff, Warren E. McCord, and to Wm. H. Locke, clerk of said court:

Please take notice that John F. Hill, the defendant above named, appeals to the supreme court of the State of Wisconsin from the judgment, and the whole thereof, made and rendered herein by the circuit court of Douglas county, Wisconsin, and entered therein on the 10th day of July, 1902, adjudging that the defendant holds the legal title to the northwest quarter of section seventeen (17), town forty-eight (48) north, of range eight (8) west, as trustee for plaintiff, and that such title be and is transferred to the plaintiff, and that defendant, his heirs and assigns, be barred from claiming or having any interest therein, and that they and each of them are restrained from setting up any right or title in or to said lands, and for three hundred and sixty-seven dollars and 37-100 dollars cost.

W. F. BAILEY,
Attorney for Defendant.

Dated Nov. 25, 1902.

(Endorsed:) Filed Nov. 28, 1902. Wm. H. Locke, clerk circuit court, Douglas Co., Wis.

62 In Circuit Court, Douglas County.

WARREN E. McCORD, Plaintiff and Respondent,
vs.
JOHN F. HILL, Defendant and Appellant.

Whereas, on the 10th day of July, A. D. 1902, in the circuit court for Douglas county, the above named plaintiff and respondent recovered a judgment against John F. Hill, the above named defendant and appellant, adjudging that the defendant holds the legal title to the lands described in the complaint, to wit, the northwest quarter of section seventeen (17), township forty-eight (48) north, of range eight (8) west, as trustee for the plaintiff, and that such title be and is transferred to the plaintiff, and that defendant, his heirs and assigns, be barred from claiming or having any interest therein, and that they and each of them are restrained from setting up any right or title in or to said lands, and for three hundred and sixty-seven dollars and 37-100 costs and the above named appellant, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the State of Wisconsin.

Now, therefore, we, William McKinnon and F. W. Hanglik, of the county of Chippewa and State of Wisconsin, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding two hundred and fifty dollars.

WM. McKINNON.
F. W. HANGLIK.

STATE OF WISCONSIN, } ss:
Chippewa County, }

William McKinnon, being duly sworn, says he is one of the subscribers to the foregoing undertaking; that he is a resident of the State of Wisconsin, and is worth the sum of five hundred dollars over and above all his debts and liabilities, in property within the State of Wisconsin not by law exempt from execution.

W. McKINNON.

Subscribed and sworn to before me this 12th day of November, A. D. 1902.

W. H. STAFFORD,
Notary Public, Wisconsin.

63 STATE OF WISCONSIN, } ss:
Chippewa County, }

F. W. Hanglik being duly sworn, says he is one of the subscribers to the foregoing undertaking, that he is a resident of the State of Wisconsin, and is worth the sum of five hundred dollars over and above all his debts and liabilities, in property within the State of Wisconsin, not by law exempt from execution.

F. W. HANGLIK.

Subscribed and sworn to before me this 12th day of November, A. D. 1902.

W. H. STAFFORD,
[SEAL.] *Notary Public, Wisconsin.*

(Endorsed:) Circuit court, Douglas county. Warren E. McCord, pl'ff *vs.* John F. Hill, def't. Notice of appeal and undertaking. Service admitted this 28th Nov. 1902, Wm. H. Locke, clerk of circuit court. Service admitted Nov. 28, 1902, Sanborn, Luse & Powell, att'ys for pl'ff. W. F. Bailey, att'y for app'l't and def't. Filed Nov. 28, 1902, Wm. H. Locke, clerk circuit court, Douglas Co., Wis. Filed Nov. 29, 1902, Clarence Kellogg, clerk of supreme court, Wis.

64 Circuit Court, Douglas County, State of Wisconsin.

WARREN E. McCORD, Plaintiff and Respondent,
vs.
JOHN F. HILL, Defendant and Appellant.

STATE OF WISCONSIN, *Douglas County,* } ss:

F. H. De Groat, being first duly sworn, on oath deposes and says that he is an attorney at law, resident and practicing in the city of Superior, county of Douglas and State of Wisconsin; that on the 28th day of November, 1902, at the said city of Superior, in said Douglas county, he personally served the notice of appeal and undertaking on appeal in the above entitled action, hereto annexed, upon Sanborn, Luse & Powell, who are the attorneys for the plaintiff and respondent in the above entitled action, and upon William H. Locke, who is the clerk of the circuit court of Douglas county, and each of them, by then and there delivering personally to and leaving with L. K. Luse, Esq., who is a member of said law firm so appearing for plaintiff and respondent herein as aforesaid, and known to deponent to be such, and by then and there delivering personally to and leaving with William H. Locke, who is clerk of the above named court as aforesaid, and personally known to deponent to be such, a true and correct copy of said notice of appeal, and thereto annexed a true and correct copy of said undertaking on appeal; and that deponent personally knows the parties so served to be the persons to whom said notice of appeal is directed; and that at the time of such service he endorsed upon each copy of said notice of appeal so served the time and place of such service and signed his name thereto.

F. H. DE GROAT.

Subscribed and sworn to before me this 28th day of November, 1902.

[SEAL.] JOHN ENCHSON,
County Clerk, Douglas County, Wisconsin.

65 (Endorsed:) Circuit court, Douglas county. Warren E. McCord, pl'ff *v.* John F. Hill, def't. Notice of appeal, undertaking and affidavit of service. Original. W. F. Bailey, att'y for def't and app'l't. Filed Nov. 28, 1902, Wm. H. Locke, clerk circuit court, Douglas Co., Wis. Filed Nov. 29, 1902, Clarence Kellogg, clerk of supreme court, Wis.

66 STATE OF WISCONSIN:

Circuit Court for Bayfield County.

WARREN E. McCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

N. B. WHARTON,
Plaintiff's Attorney.

P. O. address, Ashland, Ashland county, Wis.

(Endorsed:) Summons. Filed, circuit court, Bayfield county, Wis., Mar. 15, 1897. Geo. F. McClintock, clerk. Filed Mar. 4, 1898. Wm. H. Locke, clerk circuit court, Douglas Co., Wis. Filed July 7, 1899. Clarence Kellogg, clerk of supreme court, Wis. Filed Nov. 29, 1902. Clarence Kellogg, clerk of supreme court, Wis.

67 STATE OF WISCONSIN:

Circuit Court for Douglas County.

WARREN E. McCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

The amended complaint of the above named plaintiff, by N. B. Wharton and Spooner Sanborn and Spooner his attorneys, respectfully shows to the court, that on or about the 28th day of January, 1891, Philip W. Jacobus settled on the northwest quarter of section 17, in township 48 north, of range 8 west, in the county of Bayfield, under the laws of the United States relating to homesteads, and established a residence there on February 4, 1891. On the 23rd day of February, 1891, the said land was opened to entry by the land officers, when the said Jacobus made personal application to enter the same, which was erroneously rejected by the register and receiver of the local land office, on the ground that it was appropriated by a certain soldier's declaratory statement, filed by the defendant. On the 28th day of February, 1891, the said Jacobus filed a contest affidavit, upon which a hearing was ordered and such

hearing was had on the 11th day of May, 1891, whereupon it was found by the register and receiver of the land office at Ashland, Wisconsin, that the said Jacobus settled prior to February 23, 1891, the date of the soldier's declaratory statement filed by said Hill, and recommending that said declaratory statement be canceled. Thereupon said Hill appealed to the Commissioner of the General Land Office from said ruling of the register and receiver, whereupon the following decision was made:

DEPARTMENT OF THE INTERIOR,
"H" GENERAL LAND OFFICE, J. V. W. J. F. D.
Doc. 4, case 6016. J. W. F. W. C. A.
WASHINGTON, D. C., *Apr.* 29, 1892.

Address only the Commissioner of the General Land Office.

P. W. JACOBUS
vs.
JOHN F. HILL. } Involving Right to Enter the N. W. ¼ Sec. 17, 48 N., 8 W.

Register and receiver, Ashland, Wisconsin.

SIRS: The record in the above entitled contest case trans-
68 mitted by your letter dated July 31, 1891, shows that the defendant on February 23, 1891, filed S. D. S. No. 73, for said tract, and Jacobus filed an affidavit executed February 26, 1891, alleging settlement on said land prior to the date of defendant's filing.

Hearing was set for May 11, 1891, at which time service of notice thereof being duly had, both parties accompanied by their respective counsel and witnesses appeared ready for trial and submitted testimony upon which you rendered your joint decision dated May 14, 1891, in which you find that the plaintiff settled upon the land prior to the date of the S. D. S. filing, therefore you recommend that the same be cancelled.

An appeal therefrom was duly taken on the ground, first, that the contestant is not a *bona fide* settler, because he was not residing upon the land September 29, 1890, and second, that he had failed to perform such acts as is required of a settler upon public land.

Upon examination I find the testimony discloses that the contestant is a barber by occupation. His first acts of settlement on the land were performed January 28, 1891, and on February 4 he moved his family, consisting of a wife, thereon. He has in the way of improvements a house and some clearing valued at from $35 up to $150. His residence on the land has been continuous, though he has been absent a considerable portion of the time laboring
69 at his trade for the purpose of earning money to support himself and wife and improve his claim.

The counsel for the defense insists that the contestant has no right to the land in question as a settler thereon for the reason that

he was not on the land at the time it was restored under the act of September 29, 1890, but I am unable to see that that has any bearing upon this case.

The land being subject to entry at the time the defendant made his filing, the only question to be decided is whether the contestant had a preference right to enter the land as a settler thereon prior to and at the date of the filing, and from the testimony I find that he had; therefore your decision is sustained.

July 11, 1891, Hill presented his homestead application for the land, basing the same upon his filing. This application you "held subject to the final decision of contest" from which the applicant appealed August 8, 1891, on the following grounds, first, because you rejected it, and second, because it was presented within the time provided by law.

I find that your action upon the defendant's application was merely interlocutory, from which no appeal will lie; therefore the same is hereby dismissed.

70 In view of the record and the testimony the defendant's S. D. S. is held for cancellation subject to his right of further appeal.

Should this action become final, you will then allow the contestant 30 days to enter the land, in which case you will cancel the S. D. S. and reject said homestead application, which is returned herewith, but should the contestant fail to enter within the time allowed, you will close the case, the S. D. S. remaining intact, and allow the defendant to complete his entry and make the proper notation upon your records.

You will advise the parties in interest fully hereof and at proper time report the action taken, and in case of further appeal return to this office with the appeal the enclosed H. E. application.

Very respectfully,

W. M. STONE,
Assistant Commissioner."

That upon the receipt of such decision of the General Land Office by the register and receiver, they duly notified the parties plaintiff and defendant hereto, and no appeal having been taken from said decision of April 29, 1892, the register and receiver, on July 7, 1892, cancelled the declaratory statement of said Hill and the entry of the plaintiff on said land was accordingly confirmed and allowed; thereupon the plaintiff, having been in possession and occu-

71 pancy of said land from the 4th day of February, 1891, made due proof of his entry, settlement, occupation and improvement of said land on the 20th day of September, 1892, for the purpose of commuting his said homestead entry to a cash entry pursuant to the acts of the Congress of the United States in such case made and provided, showing in his proofs more than nineteen months' occupancy and possession and improvement of said land, whereupon a receiver's receipt for said land acknowledging the receipt of four hundred dollars ($400), in full for said northwest quarter of section

seventeen was issued to him by R. C. Heydlauff, receiver, and a certificate of entry was on the same day issued to him by H. L. Besse, register of said land office at Ashland, Wisconsin, certifying that said Jacobus, in pursuance of law, had on that day purchased of the said register said northwest quarter of section seventeen at the rate of two dollars and fifty cents ($2.50) an acre, amounting to four hundred dollars ($400), and had made full payment as required by law, and was entitled on presentation of said certificate to the Commissioner of the General Land Office to receive a patent for said land.

That thereafter, and sometime in the month of December, 1892, the plaintiff herein, Warren E. McCord, together with one Daniel
72 F. McLeod had some negotiations with the said Jacobus for the purchase of said land from him, he then being the full equitable owner thereof under his said entry certificates of said register and receiver; that during the pendency of negotiations for the purchase of said land by said plaintiff and McLeod, they had an interview with the defendant herein, John F. Hill, in which interview the said defendant stated to said plaintiff and McLeod that he did not have and would not make any claim to the said land, that he had been fairly beaten in his contest with said Jacobus, and that if the plaintiff and the said McLeod should buy the said land he would make no claim to it; that the plaintiff and said McLeod relied upon such statements of said Hill in making their purchase of the land, and afterwards on the 27th day of December, 1892, the said Philip W. Jacobus, together with his wife, by his warranty deed of conveyance made on that day, granted, bargained, sold and conveyed to the said McCord and McLeod, for the consideration of four thousand two hundred and fifty dollars ($4,250) in money, which was actually paid to the said Jacobus, the land herein described and covered by the entry of the said Jacobus as hereinbefore stated.

The plaintiff further shows that thereafter and on or about
73 the 4th day of January, 1893, for the purpose of putting the understanding between said plaintiff and McLeod and said Hill in writing, the said parties made and entered into the following agreement, duly executed by all of said parties and acknowledged by the said Hill, in words and figures following, to wit:

"For the purpose of making a settlement with John F. Hill, and his relinquishment on the N. W. ¼ of section 17, town 48, range 8 W., we hereby make him a present of a certain lot of logs, now skidded on said land, and give him permission till the 1st day of May, A. D. 1893, in which to enter on said land to remove said logs, and to occupy the house on said land and to remain on said land until that date, but not thereafter. Said logs amount to about 30,000 feet, and he agrees not to cut nor allow any of his men to cut or destroy any other timber. And in consideration of said logs, I, John F. Hill, being duly sworn, on oath, says that *he is* the man who made a soldier's application for said N. W. ¼ of 17–48–8 W,

and I make this affidavit for the purpose of relinquishing all my right, title and interest in and to said claim, which I do unto the United States. Signed, sealed and delivered and agreed upon this 4th day of January, A. D. 1893.

In presence of
W. H. PACKARD.
TRACY LYON.

DANIEL McLEOD.
W. E. McCORD. [SEAL.]
JOHN F. HILL. [SEAL.]

74 STATE OF WISCONSIN, } ss:
Bayfield County, }

Personally came before me this 4th day of January, A. D. 1893, the above named John F. Hill, to me known to be the person who executed the foregoing instrument and acknowledged the same.

[L. S.]

W. H. PACKARD,
Notary Public."

The plaintiff further shows that although the register and receiver erred in not allowing the entry of the said Jacobus on that day, and although the said Jacobus continuously resided upon, occupied and improved the said land from the 4th day of February, 1891, down to a period several months after the issue of said certificates to him by the register and receiver, yet on the 15th day of May, 1893, the Assistant Commissioner of the General Land Office of the United States, by an *ex parte* decision made without the presence of the said Jacobus or the said Hill, or any party interested in the said land or in the homestead entry of said Jacobus, wrote a letter to the register and receiver at Ashland, Wisconsin, erroneously holding that the entry of the said Jacobus was made subsequent to the act of Congress of March 3, 1891, and that proof of residence on and cultivation of the land sought to be entered for a period of fourteen months from the date of the entry was
75 required, and that said register and receiver should require the claimant, Jacobus, to furnish supplemental proof showing residence and cultivation for a period of fourteen months subsequent to July 6, 1892, which the said Commissioner decided was the date of the entry of the said Jacobus, and that he also furnish an affidavit of non-alienation of said land; meanwhile the said certificates issued by said register and receiver to the said Jacobus remained in full force and effect, and were not nor was either of them cancelled or attempted to be cancelled in any way until the 10th day of September, 1896, as hereinafter stated.

Within a short time after the said *ex parte* communication of said Assistant Commissioner to the register and receiver, the said Jacobus was notified of the same, and thereupon consulted with his counsel N. B. Wharton of Ashland, Wisconsin, as to what it would be necessary for him to do in order to retain said land, claiming that he

had resided upon, occupied and improved the same for more than two years, and stating that he had sold said land to said McLeod and McCord; thereupon the said Jacobus was advised by his said counsel that it would be better for him to procure a quit-claim deed of said property from said McLeod and McCord, in order that he might
76 make supplemental proof that he had resided upon said land more than fourteen months after the 6th day of July, 1892, and that in consideration thereof he would advise the said McCord to take from said Jacobus a mortgage securing the purchase money of said land which had been paid to said Jacobus. That thereafter and on the 1st day of September, 1893, the said McLeod and McCord, together with their wives, duly conveyed and quit-claimed to the said Jacobus, his heirs and assigns, the said land for a consideration therein expressed of four thousand three hundred dollars, and the said quit-claim deed was thereupon duly delivered to the said Jacobus, and on the 12th day of September, 1893, the said Jacobus duly executed and delivered to said McCord and McLeod a mortgage in the ordinary form upon the said land, to secure the payment of four thousand three hundred dollars, all of which was done pursuant to the advice of said Wharton, and in good faith, supposing that this would enable the said Jacobus to make supplemental proof of fourteen months' residenec upon the land subsequent to the 6th day of July, 1892.

The plaintiff further shows that afterwards and on or about the 30th day of September, 1893, the defendant, John F. Hill, disregarding his agreement which he had with the said McCord
77 and McLeod before their purchase of the said land from the said Jacobus, as afterwards evidenced in said written agreement made by them on the 4th day of January, 1893, filed in the General Land Office certain affidavits setting up and claiming that said Jacobus did not settle upon or enter said land in good faith for the purpose of making it his home, but for the purpose of speculation, and that after he had made final proof and commuted his homestead filing he sold the timber and the land, and had afterwards abandoned the land, and had abandoned the land for over six months prior to the date of said affidavits, to wit, September 30, 1893, and also filed with said affidavits the said deed from Jacobus and wife to said McCord and McLeod, and the said quit-claim deed from said McCord and McLeod to said Jacobus, and the said mortgage from said Jacobus to said McCord and McLeod, as hereinbefore stated. Thereupon and on the 19th day of December, 1893, in accordance with a letter of the Commissioner of the General Land Office of the 18th of November, A. D. 1893, a hearing was had on the 20th of April, 1894, upon the questions raised by the contests and affidavits submitted by the said Hill, and said hearing having been had before the receiver and register at Ashland, Wisconsin, the contestant Hill ap-
78 pearing in person and by his attorney, and the said Jacobus by N. B. Wharton & Son, his attorneys. Upon said

hearing the contestant called as witnesses Thomas Sullivan, George Helmer, Leonard Hill and Charles Helmer, and also was himself produced as a witness. None of such witnesses gave any testimony whatever except as to the possession, occupation and improvement of said land by the said Jacobus and his family. No proof was given on the part of any of said witnesses or the said defendant upon said hearing in any way tending to impeach the good faith of the entry of said Jacobus; all of said testimony relating to the question whether said Jacobus had actually resided upon said land. The said Jacobus called as witnesses upon said hearing J. J. Kenney, Jas. H. Drummond, Mrs. Emma Deitmeyer, Mrs. Jennie Therriult, John Toomey, Tom. Toole, James Battle, Henry M. Smith, John Wylie, Thomas Rowan, Thomas Lowe, William Rusk, Samuel P. Marlette and N. B. Wharton, and also the said Jacobus and Lillian E. Jacobus, his wife, were produced as witness- upon said hearing. All of the said testimony related entirely and exclusively to the character of the possession, occupation and improvement of the said Jacobus upon said land, except the testimony of said
79 Jacobus, who testified as follows in respect to the conveyance made by the said McCord and McLeod to him:

"Q. Why was it that after you had made proof on your land, and you believed your proof to be good, and you had sold the land, that you still continued, you say, your residence on it?

A. For the reason as I stated that I had sold this land and if there was such a thing as I wasn't going to let the man that bought it from me be a loser by it, I was going to make him all right; it wouldn't be much longer anyway, only 5 or 6 months, and we might do it and we wouldn't lose anything by it; we had nothing to lose, and he had used us well, so that I thought we ought to do it; as people ought to do it,—that was the reason and the only reason.

Q. Didn't you believe that your proof was sufficient?

A. I did, but having heard that this was necessary thought that we would go back on and give nobody a chance to make any trouble any more.

Q. But you say you didn't hear this until January, 1893?

A. Well, then I already heard in December, it wasn't only a couple of weeks or so afterwards, December, 1892, very shortly afterwards, just within two weeks or so.

Q. As soon as you heard that there was some doubt of this, although you had your final receipt, did you resume your residence there?

80 A. My wife was visiting in this meantime when I heard this, when she came back she went right out again."

The plaintiff shows to the court that no evidence was given tending in any way possible to show that the said Jacobus prior to his sale of said land to said McCord and McLeod had any contract with them or either of them, or with any other person or persons, to sell the said

land, or tending in any way to show that he had made any contract or agreement that the title which he expected to acquire should inure to the benefit of any other person or persons except himself. No evidence was given that he had ever seen or known the said McCord or McLeod prior to about the time of his conveyance to them, and not the slightest evidence was given in any respect tending to impeach the good faith of his said entry.

Upon the conclusion of said hearing, and on or about the 9th day of August, 1894, the register and receiver of said land office duly *made and* filed upon the said contest in the words and figures following, to wit:

"United States Land Office, Ashland, Wisconsin.

JOHN F. HILL
vs.
PHILIP W. JACOBUS. } Involving H. E. 3012, C. E. 5534, for Northwest Quarter of Sec. 17, Tp. 48 N., R. 8 West.

81 It appears from the records and evidence in this case that Jacobus settled on the land before the date of the Wisconsin Central opening, February 23, 1891; that his application for a homestead entry on that day was rejected because the land was covered by a soldier's declaratory statement by John F. Hill; that a hearing between the parties to determine their respective rights resulted in favor of Jacobus and that he was allowed an entry July 6, 1892. September 20, 1892, Jacobus commuted to cash entry No. 5534. The proof being premature, he was required by letter "C," May 15, 1893, to make supplemental proof, which was offered September 20 and transmitted to the General Land Office September 22, 1893.

On October 6, 1893, Hill filed an application to contest Jacobus on the ground that the entryman never settled on the land in good faith, but for the purpose of speculation; that he did not reside on the land during the six months next preceding the making of his final proof, and that he had sold the land to one W. E. McCord.

Letter "H" of November 18, 1893, directed this office to order a hearing on the charges.

The two questions to be passed upon are:

(1.) Did Jacobus abandon the land?

82 (2.) Was the sale of the land to McCord and McLeod a bar to the offering of supplemental proof?

Upon the first point the testimony of the witnesses is extremely conflicting. It is admitted by Jacobus that he worked at his trade in Superior and Iron River most of the time during his occupancy of the land, but it seems also fairly well established by the testimony of Mrs. Jacobus and numerous other witnesses that her residence was upon the land, barring certain absences on account of sickness and visits. Their cabin and its housekeeping equipment

were superior to those of most homesteaders, and the clearing, in extent and cultivation, compared favorably with that of others in the same neighborhood.

After learning that supplemental proof would probably be required, Mrs. Jacobus (p. 186) returned to the land in February, 1893, where she remained about a week, when she returned to Iron River and remained for some weeks while being treated for rheumatism. She made a brief visit to the claim in March, went there again in the latter part of May, remaining two weeks, and returned for the same length of time in July. This was apparently her last stay upon the land until after supplemental proof was offered,
83 September 20. A small crop of vegetables and hay was raised that season as in the two years before.

Upon the whole the residence of Jacobus upon the land was fairly satisfactory until after the offering of his first proof, but it is clear that his subsequent residence was for the sole purpose of enabling him to make proof in order to secure title for his transferees (pp. 178, 171).

In December, 1892, about three months after making his premature proof, Jacobus sold the land to McCord and McLeod for a stated consideration of $4,250. September 1, 1893, the grantees named in the first instrument executed a quit-claim deed to same land to Jacobus, the expressed consideration being $4,300.

September 12, 1893, the day of making supplemental proof, Jacobus and wife executed a mortgage upon the land in favor of McCord and McLeod to secure a note for the amount of the stated consideration in the quit-claim deed from McCord and McLeod to Jacobus.

The bare statement of facts points to the conclusion that the sale of the land in December, 1892, was absolute, and that the subsequent residence of Jacobus upon the land was as the agent of the transferees and for the purpose of acquiring title for them. This conclusion is strongly supported by the admissions of Jacobus upon cross-examination (pp. 168 *et seq.*).

84 Jacobus, by the deed executed in December, 1892, divested himself of all right and title to the land; granting, therefore, that the reconveyance September 1, 1893, was made in good faith by all the parties, the slender residence by his wife, during the spring and summer of 1893, was not upon the homestead of Jacobus, but upon land in which he had no claim or interest, and the residence, such as it was, could not avail him in making supplemental proof. But we think all the circumstances—the time at which the conveyance from McCord and McLeod to Jacobus was made, the execution of the mortgage, and the evidence of Jacobus himself—show that the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for the benefit of his grantees. We are of the opinion, therefore, that Jacobus's supplemental proof cannot be sustained, and that the entry

should be cancelled and a preference right of entry awarded the contestant, Hill.

Counsel for the contestant objected to the admission of the testimony of the wife of the defendant, as incompetent under the laws of Wisconsin, and since the trial have moved for a retaxation of costs. A rigid construction of the Wisconsin statutes relating to the admission of testimony would perhaps exclude that of Mrs.
85 Jacobus, but the exclusion of the wife's testimony in land cases would certainly be an extreme hardship in many instances, and we think the motion of contestant should be denied.

Ashland, Wisconsin, August 9, 1894.

G. E. KUNTZ, *Register.*
CLARENCE DENNIS, *Receiver.*"

The plaintiff shows that it was expressly held in said decision, as appears therefrom, that the residence of Jacobus upon said land was fairly satisfactory until after the offering of his first proof, but that his subsequent residence was for the sole purpose of enabling him to make proof in order to secure title for his transferees, McCord and McLeod; and plaintiff shows that said decision fairly expresses the real fact and condition of the case, and it was accordingly held that the said supplemental proof must be rejected.

The plaintiff further shows that upon appeal from the decision of said register and receiver by the said Jacobus, the Assistant Commissioner of the General Land Office held and decided affirming the decision of the register and receiver, in the words and figures following, to wit:

86 "A. B. W.
Doc. 6, case 8432.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, MF. OD.
J. W. W. T. W. A.
WASHINGTON, D. C., *Jan.* 23, 1895.

Address only the Commissioner of the General Land Office.

JOHN F. HILL
vs.
PHILIP W. JACOBUS.

Involving H. E. No. 3012, Made July 6, 1892, for the N. W. ¼ of Sec. 17, Tp. 48 N., R. 8, W.

Register and receiver, Ashland, Wis.

SIRS: On October 6, 1893, plaintiff filed contest affidavit alleging that said Jacobus did not settle upon or enter said land in good faith to make it his home, but for the purpose of speculation; that on September 20, 1892, defendant made final proof and commuted, and within a short time sold the timber and the land, and wholly abandoned it; that he did not reside on the land during the six months next preceding the making of his final proof, but instead lived at Iron River; that defendant testified falsely in making his final proof.

Hearing was ordered by office letter "H"? of November 18, 1893, and was had with both parties present.

August 9, 1894, you found for the plaintiff and recommended the cancellation of the entry.

September 5, 1894, the defendant appealed assigning several grounds of error; the material ones, however, are:

87 First. The register and receiver erred in recommending the cancellation of defendant's cash entry, when the testimony showed his full compliance with the homestead law in residence, cultivation and improvement of said land.

Second. It was error to recommend said entry for cancellation on the ground that prior to making supplemental proof in support of his homestead entry, defendant had sold said land and thereby divested himself of title; where it was shown that at the time of making supplemental proof he was the owner thereof by deed from the former purchaser.

Third. Said decision, so far as it recommends the cancellation of said entry, is without cause or justification, and is contrary to and wholly unsupported by any testimony.

It appears from the records that on September 20, 1892, defendant was permitted to commute his homestead entry to cash entry No. 5534.

By letter "C," of May 15, 1893, you were directed to require Jacobus to furnish supplemental proof, as said * * * commutation was premature.

It is shown by the evidence that defendant had a small log house on the land; that it was well finished and well furnished, that he had about two acres cleared; that the improvements were

88 worth about $200. He did not have any stock of any description, no chickens or other poultry; that on December 27, 1892, defendant sold said land to David McLeod and W. E. McCord for $4,250 cash.

On the question of residence the testimony is very conflicting.

Defendant's wife stayed on the land a part of the time and defendant worked in his barber shop in the town of Iron River, and stayed there nearly all the time working at his trade; he made occasional visits to the land on the Sabbath day.

It also appears that defendant rented three rooms in Iron River after he had sold the land, and he, with his wife, moved into them; that after defendant learned that he was required to furnish supplemental proof, because his commutation was premature, his wife moved back to the land, but defendant still remained in Iron River, making occasional visits to the land on the Sabbath and returning the same day. In reply to the question, "Why was it that after you had made proof on the land and you believed the proof to be good, and you had sold the land, that you still continued your residence on it?" He answered, "For the reason, as I stated, that I sold this land, and if there was such a thing * * * I wasn't going

89 to let the men that bought it from me be loser by it; I was going to make him all right; it wouldn't be much longer

anyway, only 5 or 6 months, and we might do it and we wouldn't lose anything by it; we had nothing to lose and he had used us well, so I thought we ought to do it. * * * That was the reason and the only reason." Plaintiff further testified that the land was reconveyed to him for the purpose of enabling him to make the proof; that it was to enable him to acquire title to it.

In the case of Cann *vs.* Conner, 4 L. D. 322, it was held that, "After the submission of final proof and a hearing had thereon, additional time to show compliance with the law, though within the life of the filing, will not be granted in the presence of an adverse claim and where bad faith is evident."

The case of Alonzo W. Laird, 9 L. D. 527, is very similar to the one at bar. In that case it was held that, "One who enters with no intention of establishing residence in good faith, and subsequently submits fraudulent final proof, cannot cure the wrong and acquire title to the land by returning to the same after said proof has been rejected and his entry held for cancellation."

In the case of Dougherty, 10 L. D. 79, the request of counsel for entryman to make a new entry was denied for the reason
90 that he cannot make a homestead entry for the benefit of another, for the entry must be for his own exclusive use and benefit.

The sale and conveyance of the land is clearly proven, and it is also as clearly shown that the land was reconveyed to defendant so that he could submit his final supplemental proof for the benefit of McLeod and McCord; hence your opinion is affirmed, and defendant's homestead entry and his cash entry for the land involved is held for cancellation.

You will so notify the parties in interest and defendant of his right of appeal.

Respectfully, EDW. A. BOWERS,
Ass't Commissioner."

Upon appeal to the Secretary of the Interior, and on the 28th day of April, 1896, the said Secretary affirmed the said decision of the Assistant Commissioner by his decision in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
F. L. C. P. J. R. P. J. R.
Vol. 22, No. 386. G. B. G. R. W. H.
WASHINGTON, *April* 28, 1896.

JOHN F. HILL
vs.
PHILIP W. JACOBUS.

The Commissioner of the General Land Office.

SIR: Philip W. Jacobus has appealed from the decision of
91 your office, dated January 23, 1895, in the case of John F. Hill against said Jacobus, sustaining the action of the local officers in holding for cancellation his homestead entry No. 3012 and cash entry No. 5534, respectively, for the N. W. ¼ of section 17, T. 48 N., R. 8 W., Ashland land district, Wisconsin.

Said decision fairly sets forth all the facts in this case, and the conclusion therein reached is sustained by the testimony and is in conformity with law, and the decisions of the department, and is hereby affirmed.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary*."

The plaintiff further shows that thereafter and on or about the 3rd day of June, 1896, the Congress of the United States, in order to give effect to homestead entries of lands which had been commuted or attempted to be commuted by premature proof, passed and adopted an act entitled "An act relating to commutation of homestead entries, and to confirm such entries when commutation proofs were received by local land officers prematurely;" and that said act is known as chapter 312 of the Acts of the Fifty-fourth Congress, and is also referred to as 29 Statutes at Large, page 197, and is in the words and figures following, to wit:

92 "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the

homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs and legal representatives, as of the date of such final certificate of entry and a patent issued thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final cer-
93 tificate: *Provided*, That this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been cancelled when the lands made vacant by such cancellation have been re-entered under the homestead act.

SECTION 2. That all commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement.

SECTION 3. That all acts and parts of acts in conflict with any of the provisions of this act are hereby repealed.

SECTION 4. That this act shall take effect and be in force from and after its passage and approval.

Approved June 3, 1896."

That at the time of the passage of said act, the said final certificates had not been cancelled, nor had the said land been vacant by any such cancellation, nor had the said lands in any manner been re-entered under the homestead act, nor were there any adverse claimants to said land whose rights originated prior to such final proof; but the said certificate of the register of the land office at Ashland, No. 5534, issued to said Jacobus September 20, 1892, as hereinbefore stated, was not cancelled until more than three months after the passage and publication of said act, nor was any
94 entry of said land made or allowed or authorized to be made by the said John F. Hill until long after the passage and publication of said act of Congress.

The plaintiff further shows that after the adoption of said act of Congress of June 3, 1896, and on or about the 1st day of July, 1896, the said Jacobus duly made a motion before the Secretary of the Interior for a review of said decision of April 28, 1896, affirming the decision of the Assistant Commissioner of the General Land Office of January 23, 1895, hereinbefore particularly set forth, on the ground that the said Jacobus was fully within said act of Congress of June 3, 1896. Upon said motion for review, the Secretary of the Interior, by mistake of law, erroneously decided and held that the said Jacobus was not within the act of June 3, 1896, for reasons set forth in the decision of the Assistant Commissioner of the General Land Office of January 23, 1895, hereinbefore particularly set forth, and that in and by said decision said Secretary by mistake erroneously so held and decided that because the said claimant, Jacobus, was unable to make supplemental proof after his final or commutation proofs had been made, he was thereby excluded from the provisions of said act of June

3, 1896; when on the contrary it is the true intent and meaning of such act — June 3, 1896, to allow commutation
95 homestead entries to be made, provided the claimant was entitled to make same at the time of submitting his commutation final proofs, which were afterwards held by the department to be premature, and the construction of said act of June 3, 1896, in no manner depends on facts occurring after the submission of said commutation proofs in any case; that it never was held by any of the officers of the General Land Office or the local land office or of the Department of the Interior in any of said proceedings, that the said Jacobus was not an entryman in good faith of the said land, or that there was any defect or fraud whatever in his entry of said land or in his final or commutation proof thereof; but the only fact which was ever held against the said Jacobus in said proceedings was that by reason of having conveyed said land after he had obtained said final certificates to the plaintiff and said McLeod, he was therefore precluded from making supplemental proof as required by the Commissioner of the General Land Office, which supplemental proof became immaterial and unnecessary under the act of June 3, 1896; that the said office decision of January 23, 1895, did not find any fraud or lack of good faith on the part of said Jacobus, but simply found and held that because he had sold the land after receiving his final certificates,
96 that he could not make supplemental proof, and the plaintiff submits that the decision of January 23, 1895, was correct, inasmuch as said Jacobus did not then own the land, and if the title of said Jacobus depended entirely upon his ability to make such supplemental proof, he or his grantees could never have obtained a patent of said land; but inasmuch as it was found and determined by the Land Department through all the stages of said proceedings that he was an entryman in good faith, that his entry was entirely satisfactory down to the time of making final proofs, he was therefore brought clearly within the act of June 3, 1896, and the Secretary of the Interior by error of law improperly and unlawfully excluded him from the benefits of that act. The said decision of the Secretary of the Interior of August 4, 1896, is in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
F. L. C. C. J. G. C. J. G.
G. B. G. R. W. H.
WASHINGTON, *August* 4, 1896.

JOHN F. HILL
vs.
PHILIP W. JACOBUS. } Motion for Review.

The Commissioner of the General Land Office.

SIR: Philip W. Jacobus, through his attorneys, has filed a motion for review of departmental decision of April 28, 1896,
97 wherein is affirmed the action of your office in holding for cancellation his homestead and cash entries for the N. W. ¼ of sec. 17, T. 48 N., R. 8 W., Ashland land district, Wisconsin; also a motion to confirm said entries under the provisions of the act of Congress approved June 3, 1896.

The applicant, in his motion for review, alleges that his case is in all respects similar to that of Herbert H. Augusta (on review, 21 L. D., 200), wherein it was held that a commuted homestead entry may be equitably confirmed if after its allowance the land was sold to a purchaser in good faith, and fourteen months' residence was thereby rendered impossible.

The very essence of the decision confirming the entry in that case, however, was the evidence of good faith on the part of the entryman. The evidence in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent, as fully set out in your office decision of January 23, 1895.

It is likewise impossible to confirm the entry under the provisions of the act of June 3, 1896, for the same reason, namely, the practice of fraud in making proofs.

Both the motion for review and the motion to confirm are accordingly denied.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*"

98 That on or about the 7th day of September, A. D. 1896, the said Hill made an entry upon the said land under the homestead laws of the United States, which entry was allowed by the local land officers, and on the 28th day of November, 1896, there was issued to the said Hill by the receiver of the land office at Ashland, aforesaid, the usual certificate of entry, and on the 12th day of January, 1897, there was issued to said Hill by the land officers of the United States the usual patent therefor in and by which there was conveyed to said Hill the said land hereinbefore described, and the rents, issues and profits thereof and the appurtenances thereunto belonging.

The plaintiff further shows that on the 31st day of October, 1896, the said Philip W. Jacobus and Lillian E. Jacobus, his wife, for an express consideration of four thousand three hundred dollars ($4300), granted, bargained, sold and conveyed to the said McLeod and McCord the said land herein described, and the said deed was duly witnessed and acknowledged and is entitled to be recorded, and that said deed was made for the purpose of restoring to the said parties of the second part the title of said land conveyed by them to said Jacobus by the quit-claim deed of September 1, 1893.

90 The plaintiff further shows that on or about the 13th day of April, 1896, the said Daniel McLeod and wife, by a deed duly executed and acknowledged on that day, granted, bargained, sold and conveyed to the plaintiff the land hereinbefore described, and that the plaintiff is now the equitable owner of the said land in fee simple absolute, and that the defendant Hill ought by reason of the premises herein, be held a trustee of the plaintiff for the said land, and decreed to release and convey the same to him.

Wherefore the plaintiff demands judgment that the said defendant John F. Hill, may be decreed and held to be a trustee of this plaintiff for the said land and to hold the legal title thereof in trust for this plaintiff, and may be ordered and decreed to convey the same to him by proper conveyance, and that it may be held and determined that by reason of the proceedings herein stated, the said Jacobus was entitled to have issued to him a patent of the said land, and that the said patent would have inured to the benefit of the said plaintiff, and that the plaintiff is the full legal owner of the said land; and that the plaintiff may have such further or other relief as shall be just, together with the costs of this suit.

SANBORN, LUSE & ELLIS,
Plaintiff's Attorneys.

LYMAN T. POWELL, *Of Counsel.*

100 STATE OF WISCONSIN, } ss:
Dane County, }

A. L. Sanborn, being duly sworn, on oath says that he is one of the attorneys for above named plaintiff, and makes this verification in his behalf, and he is authorized so to do. That he has read the foregoing complaint and knows the contents thereof and the same is true to his knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. That this affiant's knowledge and the grounds of his belief are founded upon the records of the Land Department of the United States, a certified copy of which is now in the possession of this affiant, and upon information given him by the plaintiff and other persons cognizant of the facts therein set forth, and that the reason why this verification is not made by the plaintiff is that said plaintiff is not within the county wherein his attorneys or any of them reside.

A. L. SANBORN.

Subscribed and sworn to before me, this 6th day of January, A. D. 1900.

F. C. ELLIS,
Notary Public, Dane Co., Wis.

(Endorsed:) State of Wisconsin, circuit court, Douglas Co. Warren E. McCord, plaintiff, *vs.* John F. Hill, defendant. Amended complaint. Jan. 6, 1900. Received copy of within, this 9th day of January, 1900. A. B. Ross, attorney for def't. Filed Jan. 25, 1900, Wm. H. Locke, clerk circuit court, Douglas Co., Wis. Filed July 10, 1900, Clarence Kellogg, clerk of supreme court, Wis. Filed Nov. 29, 1902, Clarence Kellogg, clerk of supreme court, Wis.

101 Circuit Court, Douglas County.

WARREN E. MCCORD, Plaintiff,
vs.
JOHN F. HILL and WILLIAM MCKINNON, Defendants.

The above named defendants hereby demur to the amended complaint of the plaintiff herein, and state as ground of their demurrer that the amended complaint fails to state facts sufficient to constitute a cause of action.

A. B. ROSS,
Attorney for Defendants.

Dated January 27th, 1900.

(Endorsements:) State of Wisconsin, Douglas county. Circuit court. Warren E. McCord, plaintiff *vs.* John F. Hill, defendant. Demurrer. Filed Jan. 27, 1900. Wm. H. Locke, clerk circuit court, Douglas county. Due and personal service of the within demurrer is hereby admitted at the city of Superior, in said State, on the 27th day of January, 1900. Sanborn, Luse & Powell, attorneys for pl'ff. Original. A. B. Ross, attorney for def'ts, West Superior, Wisconsin. Filed July 10, 1900. Clarence Kellogg, clerk of supreme court, Wis. Filed April 30, 1903. Clarence Kellogg, clerk of supreme court, Wis.

102 STATE OF WISCONSIN:

Circuit Court for Douglas County.

WARREN E. MCCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

The above named defendant, John F. Hill, answering the amended complaint of the plaintiff, admits that on the 23rd day of February,

1891, the northwest quarter of section seventeen (17), in township forty-eight (48), north, of range eight (8) west, was opened to entry by the land officers of the United States. That on the 28th day of February, 1891, Philip W. Jacobus filed a contest affidavit upon which a hearing was ordered and upon which a hearing was had on the 11th day of May, 1891, and that upon such hearing the declaratory statement previously filed by the defendant was by the local land officers recommended to be cancelled. That thereupon said Hill appealed to the Commissioner of the General Land Office from said ruling of the register and receiver, whereupon the decision was made by such Commissioner stated at length in said complaint. That on July 7, 1892, the register and receiver cancelled such declaratory statement of the defendant, and that *such* Jacobus was allowed to enter said land. That on
103 the 20th day of September, 1892, a receiver's receipt for said land acknowledging the receipt of four hundred dollars ($400) was issued to said Jacobus and a certificate of entry was on the same day issued to him by H. L. Besee, register of said local land office at Ashland, Wisconsin, in the usual form in such cases; that thereafter the said defendants Warren E. McCord and Daniel McLeod signed the agreement or writing set forth in folios 18 and 19 of said complaint. That on the 15th day of May, 1893, the Commissioner of the General Land Office wrote a letter to the register and receiver at Ashland, Wisconsin, holding that the entry of the said Jacobus was made subsequent to the act of Congress of March 3, 1891, and otherwise as stated in said complaint in folios 22 and 23 thereof. That on the 27th day of December, 1892, the said Philip W. Jacobus, together with his wife, made and executed a warranty deed of conveyance of said land to Warren E. McCord and Daniel McLeod, for the expressed consideration of $4,250. That subsequently thereto, and on the 1st day of September, 1893, the said McCord and McLeod executed a quit-claim deed of said land to the said Jacobus for the expressed consideration of $4,300, and on the 12th day of September, 1893, the said Jacobus executed and delivered to said
104 McCord and McLeod a mortgage in the ordinary form upon said land to secure the payment of $4300. That on the 30th day of September, 1893, the defendant filed in the General Land Office certain affidavits to the effect as stated in said complaint in folios 27 and 28 of said complaint, that a hearing was had pursuant to the directions of the Commissioner of the General Land Office on the 20th day of April, 1894, upon the questions raised by the contest and affidavits submitted by the said Hill had before the receiver and register in Ashland, Wisconsin. That the witnesses named in said complaint in folios 29, 30 and 31 appeared and testified at such hearing, that said Jacobus made answers to the questions proposed, as stated in folios 32, 33 and 34 of said complaint; that on the 9th day of August, 1894, the register and receiver of said land office made and transmitted to the Commissioner of the General Land Office a report in the words and figures as stated in folios 36

to 47, inclusive, in said complaint; that upon review of said report the Commissioner of the General Land Office made the decision and order substantially as stated in said complaint in folios 49 to 60, inclusive, containing certain other matters hereinafter stated; that upon appeal to the Secretary of the Interior, and on the 28th
105 day of April, 1896, the Secretary affirmed the said decision of the Commissioner in the words and figures as stated in folios 60 to 62, inclusive, of said complaint; that on the 3rd day of June, 1896, the Congress of the United States passed the act as set forth in the complaint in folios 62 to 66, inclusive; that on about the 6th day of July, 1896, the said Jacobus made a motion for review of said decision of the Secretary of the Interior of April 28, 1896, that the Secretary decided the said Jacobus was not within the act of June 3, 1896, which decision is as given at length in folios 74 to 77, inclusive; that on about the 7th day of September, 1896, the defendant made an entry upon the said land under the homestead laws of the United States which was allowed by the local land officers, and on the 28th day of November, 1896, there was issued to said Hill by the receiver of the land office at Ashland the usual certificate of entry, and on the 12th day of January, 1897, there was issued to said defendant the usual patent therefor in and by which there was conveyed to said defendant the said tract of land; that on the 31st day of October, 1896, the said Jacobus and wife executed a deed of said land to the said McCord and McLeod, the consideration expressed therein being $4300, which was duly acknowledged and witnessed so as to be entitled to record; that on or about the
106 13th day of April, 1896, the said Daniel McLeod and wife executed a deed of the said land to the plaintiff and duly acknowledged the same.

The defendant further answering said complaint denies that the said Philip W. Jacobus settled on said land on or about the 28th day of January, 1891, or at any other time; that he established a residence thereon on February 4th, 1891, or at any other time; that he made personal application to enter said land on the 23rd day of February, 1891; that any such application was erroneously rejected by the register and receiver of the local land office; that it was found by such officers on the 11th day of May, 1891, or any other time by such register and receiver that the said Jacobus settled on said land prior to February 23, 1891; that the entry of the plaintiff upon said land was confirmed and allowed by the Commissioner or Assistant Commissioner of the General Land Office; that the plaintiff had been in the continual possession and occupancy of said land from the 4th day of February, 1891, to the 20th day of September, 1892; that he made due proof of his entry, settlement and improvement of said land on the 20th day of September, 1892; that by his proofs he showed more than nineteen months'
107 occupancy and possession and improvement of said land; that said Jacobus was in the month of December, 1892, the equitable owner of said land; that the defendant stated to plaintiff

and McLeod that he did not have and would not make any claim to said land; that he had been fairly beaten in his contest with Jacobus, and that if the plaintiff and the said McLeod should buy the land he would make no claim to it, or any other statement of like import; that the plaintiff and McLeod relied upon such or any other statements of defendant in making their purchase of the said land. That there was paid to said Jacobus the sum of $4,250 by the said McCord and McLeod, or either of them, at the time of such conveyance, or the full amount thereof, after such conveyance by said Jacobus to them; that the said Jacobus continuously resided upon, occupied and improved the said land from the 4th day of February, 1891, down to a period of several months after the issue of said certificates to him by the register and receiver; that the Commissioner of the General Land Office, by his letter of May 15, 1893, erroneously held that the entry of said Jacobus was made subsequent to the act of Congress of March 3, 1891 (it being the fact and law that his entry was subsequent to such date); that it was error on the part of the Commis-
108 sioner to hold that proof of residence on and cultivation of the land for a period of fourteen months from the date of entry was required and that the register and receiver should require the said Jacobus to furnish supplemental proof showing residence and cultivation for a period of fourteen months subsequent to July 6, 1892, and that he also furnish an affidavit of non-alienation of said land.

And the said defendant further denies that the said certificate of entry remained uncancelled after the 28th day of April, 1896.

And the said defendant further answering alleges, that he has no knowledge nor has he any information sufficient to form a belief as to whether the allegations and statements as stated in the complaint in folios 24 and the first four lines of folio 25 thereof, between N. B. Wharton and the said Jacobus, were made and stated and therefore denies the same; that he has no knowledge or information as to whether the consideration of $4250 *dollars* was the true consideration for the conveyance from Jacobus to the said McCord and McLeod, or what sum was the true consideration therefor, and when the same was paid, and therefor- denies the allegations in respect thereto contained in folios 16 and 17 of said complaint.

109 The defendant further answering said complaint, denies that at the hearing November 18, 1893, that any of the witnesses called and produced by the said Hill, to wit, Thomas Sullivan, George Helmer, Leonard Hill, Charles Helmer and John F. Hill, gave any testimony except as to the possession, occupation and improvement of said land by the said Jacobus and his family, and did not give testimony tending to impeach the good faith of the entry of said Jacobus, and that all of said testimony related to the question whether said Jacobus had actually resided upon the land. That the testimony of all the witnesses called and sworn upon such hearing is hereinafter set forth in full to which reference is made as to

the nature, character, extent and effect of the testimony as offered and received upon such occasion.

The said defendant further denies that the conclusion stated by the plaintiff in the complaint, appearing in folios 47 and 48 thereof, is in accord with or sustained by the written report of the said land officers of date August 9, 1894, and which is stated at length in said complaint, commencing in folio 36 thereof, and also that such decision expresses the real fact and condition of the case.

The defendant further answering denies that the certificate issued to said Jacobus had not been cancelled and the land made
110 vacant by cancellation thereof, and that they had not re-entered under the homestead act, and that there were no adverse claimants to the land whose rights originated prior to making such final proof at the time of the passage and publication of the said act of Congress of June 3, 1896, and alleges that such certificate had been cancelled and the land re-entered under the homestead act prior to the passage of said act of June, 1896.

The defendant further answering denies that the Secretary of the Interior made any mistakes of law in his decision of August 4, 1896, denying the motion for review of his former decision made in behalf of said Jacobus, and also that the construction placed upon said decision by the plaintiff is correct or warranted by the language thereof in connection with the record and the facts upon which such decision was based, and also that the construction placed upon such act by the plaintiff is the true and correct meaning thereof.

The defendant further denies that it was found and determined by the Land Department, through all the stages of the said proceedings, or at any stage thereof, that the said Jacobus was an entryman in good faith, or that his entry was entirely satisfactory down
111 to the time of making final proofs, or that he was at any time by the action of such department or by his own acts brought within the act of June 3, 1896, or that he was unlawfully excluded from the benefits thereof.

The defendant further answering said complaint denies each and every allegation thereof not hereinbefore expressly admitted or denied.

And the defendant further answering said complaint alleges, that on the 23rd day of February, 1891, the said land was opened to entry by the Land Department of the Government of the United States, and that prior to that day the land was not open to settlement or homestead entry and was vacant and unoccupied. That at the first moment that right could be secured by private entry or settlement upon such land, and on the morning of the 23rd day of February, 1891, and before any other entry thereof or right thereto was made or applied for, the defendant appeared in person at the local land office at Ashland, Wisconsin, and duly made and filed his soldier's declaratory statement upon such land, which was duly accepted, received and allowed by the local land officers. That on the 28th day of February, 1891, the said Jacobus filed a

contest affidavit upon which a hearing was ordered, and
112 such proceedings were had that the local land officers recommended that said declaratory statement be cancelled, which report and recommendation was, upon the appeal of the said Hill, approved by the Commissioner of the Land Office by his decision bearing date April 29, 1892, fully set out in plaintiff's complaint in folio 4 *et seq.*, to which reference is hereby made. That it appears in and by said decision that the appeal was duly taken on two grounds:—That the contestant Jacobus was not a *bona fide* settler because he was not residing upon the land, September 29, 1890; 2—That he had failed to perform such acts as *is* required of a settler upon the public land. That the first ground of contest was not in the case. That the only question for decision was whether the contestant had a preference right to enter the land as a settler thereon prior to and at the date of filing by Hill. In other words, whether the right of a settler upon the land is paramount to the right of one filing upon the land, where they both concur at the same moment of time, and the Commissioner decided that, from the testimony, Jacobus had performed sufficient acts to constitute him a settler at that time and that he thus had the paramount right. No question of priority in time as a question of fact was determined, nor was
113 any other question determined. Jacobus was given thirty days to enter the land. The contestant and Jacobus acquiesced in said decision of the Commissioner, and on July 7, 1892, which was within thirty days after notice, entered said land under and by virtue of such decision of the Commissioner solely, the declaratory statement of Hill having been cancelled, and not under his right of settlement. He was merely given a preference right to entry. Such entry was in words and figures following, to wit:

Homestead.

Application No. 3012.

LAND OFFICE AT ASHLAND, WIS., *July* 6, 1892.

I, Philip W. Jacobus, of Iron River, Bayfield Co., Wis., do hereby apply to enter, under section 2289, Revised Statutes of the United States, the N. W. ¼ of section 17, in township 48 N., of range 8 W., containing 160 acres.

PHILIP W. JACOBUS.

LAND OFFICE AT ASHLAND, WIS., *July* 6, 1892.

I, H. L. Besse, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same. Applicant personally known to receiver.

H. L. BESSE, *Register.*

114 *Homestead Affidavit.*

U. S. LAND OFFICE AT ASHLAND, WIS., *July* 6, 1892.

I, Philip W. Jacobus, of Bayfield Co., Wis., having filed my application No. 3012, for an entry under section 2289, Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am a native born citizen of the United States, and am over 21 years of age and the head of a family; that I settled on the land applied for January 28, 1891, and establis-ed a residence thereon with my family February 4, 1891, which residence has been ever since maintained, and I have good and lasting improvements thereon; that my said application is honestly and in good faith for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, but in good faith to obtain a home for myself, and that
115 I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself; and further, that since August 30, 1890, I have not entered under the laws of the United States, or filed upon a quantity of land, agricultural in character, and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres; and that I have not heretofore made an entry under the homestead laws, and this application and affidavit *is* made in lieu of application and affidavit dated February 23, 1891, for the same land.

PHILIP W. JACOBUS.

Sworn to and subscribed before me this 6th day of July, 1892.

H. L. BESSE, *Register.*

The defendant further alleges that said Jacobus, on the 20th day of September, 1891, abandoned his homestead entry so made as aforesaid and attempted to make a cash entry of said land. That such attempt was with the fraudulent intent and purpose to evade the provisions and requirements of the homestead laws and
116 secure a patent for said land without residence thereon for the time required by law, and without complying with the

provisions of the law, and in order that he could give title to the land to the plaintiff who, as defendant verily believes and so alleges, had made arrangements to purchase the same and who furnished the money to make such cash entry. That on said 20th day of September, 1892, the said Jacobus presented to the local land office the following false and fraudulent final proofs:

Homestead Proof—Testimony of Witness.

WILLIAM RUSK, being called as witness in support of the homestead entry of Philip W. Jacobus for N. W. ¼, sec. 17, tp. 48 N. R. 8 W., testifies as follows:

Question 1. What is your name, age and post-office address?

Answer. William Rusk, age 50, P. O. address, Iron River, Bayfield Co., Wis.

Ques. Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Yes, to all parts of the question.

Ques. 3. Is said tract within the limits of an incorporated town or selected site of a city or used in any way for trade or business?

Ans. No, to all parts of the question.

117 Ques. 4. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land?

Ans. Timbered farming land.

Q. 5. When did claimant settle upon the homestead and at what date did he establish actual residence thereon?

Ans. Month of February, 1891. He established his actual residence on the land in the month of February, 1891.

Ques. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. Yes, they have made it their home. He is a married man

Ques. 7. For what period or periods has the settler been absen from the land since making settlement, and for what purpose; and if temporarily absent did claimant's family reside upon and cultivate the land during such absence?

Ans. He was temporarily absent a week or two at a time at different times, earning money to support his family. Claimant's family resided on the land during his absence.

Ques. 8. How much of the homestead has the settler cultivated and for how many seasons did he raise crops thereon?

Ans. About 1¾ acres under cultivation; one crop in 1891, and this will be his second.

118 Ques. 9. What improvements are on the land and what is their value?

Ans. Log house 14 x 16, scoop roof, covered with tar paper, board floor, 1 door, 2 windows; house is well furnished, floors all

carpeted, and the house is all papered inside; store house, 12 x 12, roof board and tar papered; outhouse; 1¾ acres crop, and fenced, cut some road; total value of imp. $200.00.

Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. Not that I know of.

Ques. 11. Had the claimant mortgaged, sold or contracted to sell any portion of said homestead?

Ans. Not to my knowledge.

Ques. 12. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. I think he has acted in good faith.

WILLIAM RUSK.

I hereby certify that the foregoing testimony was read to the witness before being subscribed, and was sworn to before me this 20th day of September, 1892.

H. L. BESSE, *Register.*

Homestead Proof—Testimony of Witness.

119 HERBERT H. AUGUSTA, being called as witness in support of the homestead entry of Philip W. Jacobus for N. W. sec. 17 tp 48 N., R. 8 W., testifies as follows:

Ques. 1. What is your name, age, and post-office address?

Ans. Herbert H. Augusta, age 33, P. O., Iron River, Bayfield Co., Wis.

Ques. 2. Are you well acquainted with the claimant in this case, and the land embraced in his claim.

Ans. Yes to all parts of the question.

Ques. 3. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No, to all parts of the question.

Ques. 4. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land?

A. Timbered farming land.

Ques. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans. February, 1891. He established his actual residence thereon at that time.

Ques. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact).

Ans. Yes, they have. He is a married man.

Ques. 7. For what period or periods has the settler been
120 absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. He has been temporarily absent a week or two at a time, working to earn money to support his family. His family lived on land continuously.

Ques. 8. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans. 1¾ acres. This season making his second.

Ques. 9. What improvements are on the land and what is their value?

Ans. Log house 14 x 16, shake roof covered with tar paper, board floor, 1 door, 2 windows, veranda on house ;store house 12 x 12, pole roof, tar papered out house; 1¾ acre clearing fenced in crop. Value of imp. $250.00.

Ques. 10. Are there any indications of coal, salines or minerals of any kind on the homestead? (If so, describe what they are and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. Not to my knowledge.

Ques. 11. Has the claimant mortgaged, sold or contracted to sell, any portion of said homestead?

Ans. Not to my knowledge.

Ques. 12. Are you interested in this claim; and do you
121 think the settler has acted in entire good faith in perfecting this entry?

Ans. No. Yes, I think he has.

HERBERT H. AUGUSTA.

I hereby certify that the foregoing testimony was read to the witness before being subscribed, and was sworn to before me this 20th day of September, 1892.

H. L. BESSE, *Register.*

Homestead Proof—Testimony of Claimant.

PHILIP W. JACOBUS, being called as a witness in his own behalf in support of homestead entry No. 3012, for N. W. ¼ sec. 17, tp. 48 N. R. 8 W., testifies as follows:

Ques. 1. What is your name, age and post-office address?

Ans. Philip W. Jacobus, age 29, P. O. address Iron River, Bayfield Co., Wis.

Ques. 2. Are you a native born citizen of the United States, and if so, in what State or Territory were you born?

Ans. I am. Wisconsin.

Ques. 3. Are you the identical person who made homestead entry

No. 3012 at the Ashland, Wis., land office on the 6th day of July, 1892, and what is the true description of the land now claimed by you?

Ans. I am. N. W. ¼, sec. 17, tp. 48 N., R. 8 W.

Ques. 4. When was your house built on the land, and
122 when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. The house was built when I established my actual residence on the land, February 4, 1891. I purchased the improvements from another party. Log house 14 x 16. Shake roof, covered with 3 thicknesses of tar paper; board floor, 1 door, 2 twelve light windows, veranda on house, built of lumber, store house built of logs, 14 x 14, pole roof covered with tar paper, out house, cellar under house, 1½ acres clearing and in crop—total value of imp. $250.

Ques. 5. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. Wife and myself. Yes, we have had no other home but this.

Ques. 6. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans. I was absent at different times, two or three weeks at a time, working to earn money to support my family and improve my place. I never was absent exceeding three weeks at any one
123 time, and my wife has always lived continuously on the land.

Ques. 7. How much of the land have you cultivated each season and for how many seasons have you raised crops thereon?

Ans. ¾ of an acre in 1891, and have 1½ acre in crop now. One, this will make two.

Ques. 8. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

Ans. No, to all parts of the question.

Ques. 8. What is the character of the land? Is it timber, prairie, grazing, mountainous, or ordinary agricultural land? State its kind and quality; and for what purpose it is most valuable.

Ans. It is timbered agricultural land, at present for timber, when cleared for agricultural purposes.

Ques. 10. Are there any indications of coal, salines or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No, I have not seen any indications of minerals.

Ques. 11. Have you ever made any other homestead entry? (If so, describe the same.)

Ans. No.

124 Ques. 12. Have you sold, conveyed or mortgaged any portion of the land; and if so, to whom and for what purpose?
Ans. No, I have not.
Ques. 13. Have you any personal property of any kind elsewhere than on this claim. (If so, describe the same, and state where the same is kept.)
Ans. I have barber shop fixtures in Iron River, Wis.

PHILIP W. JACOBUS.

I hereby certify that the foregoing testimony was read to the claimant before being subscribed and was sworn to before me this 20th day of September, 1892.

H. L. BESSE, *Register.*

Final Affidavit Required of Homestead Claimants.

Section 2301 of the Revised Statutes of the United States.

I, Philip W. Jacobus, having made a homestead entry of the N. W. ¼, section No. 17, in township No. 48 N., of range No. 8 W., subject to entry at Ashland, Wis., under section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of section No. 2301 of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am over 21 years of age, and a
125 native, a citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said land since the 4th day of February, 1891, to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry under the homestead laws of the United States.

PHILIP W. JACOBUS.

I, H. L. Besse, register of U. S. land office, do hereby oertify that the above affidavit was subscribed and sworn to before me this 20th day of September, 1892.

H. L. BESSE, *Register.*

That such proofs were false, in that it was stated therein that the said Jacobus had one and three-fourth acres of land cleared; that the value of his improvements was $250; that his wife and himself had resided continuously on the land since first establishing residence thereon. That they had no other home; that he was absent at different times two or three weeks at a time working to earn money to sup-

port his family thereby, by the latter statement intending to con-
126 vey the meaning and having it so interpreted and understood that he spent most of his time upon the land, and that the times of his absence was exceptional and occasional only. That he never was absent exceeding three weeks at any one time. That his wife had always lived continuously on the land. That he cultivated three-fourths of an acre in 1891. That he had one and three-fourths acres in crop at the time of making such final proof. That he had not sold, conveyed or mortgaged any portion of land. That in answer to the question, "Have you any personal property of any kind elsewhere than on this claim," stating, "I have barber shop fixtures in Iron River, Wis.," intending to convey the meaning and have it so interpreted and understood that he had no other property not on the claim than his barber shop fixtures, when in truth and in fact he had not at any time three-quarters of an acre cleared, that the value of his improvements were merely nominal, not worth ten dollars, that neither himself nor his wife had resided continuously on said land, that he himself was not upon the land at any one time to exceed two or three days at a time, that he spent practically all his time at Iron River, Wisconsin, during the time he states he was upon the land; that his wife never resided upon the land, was absent therefrom prac-
127 tically four-fifths of the time, making only occasional visits to the land with the ostensible purpose of making a mere colorable residence thereon. That the said Jacobus and wife had a home in Superior and Iron River during said time. That he had no crop planted upon the land in 1892; that he had only about fifty hills of potatoes, which he did not care for or harvest, a few vegetables, occupying altogether less than a quarter of an acre. That he did no clearing; that the underbrush had been cut out of about an acre of land, and the forest trees of pine being left and so shading the ground that it was not possible for crops to grow; that no part of the land was broken up or prepared for crops, except a small garden spot and some grass seed sown in the opening upon the surface of the ground merely, and not harvested or used. That he had household furniture elsewhere. The most of his wife's clothing was elsewhere, and he took his meals elsewhere continuously except an occasional Sunday when he would drive out to the land, and his wife when not visiting at Chippewa Falls, was living with him off from the land except a few days when she was visiting upon the land; that he did no work himself and never attempted or intended to clear the land or any particular portion thereof or make a farm thereon, but intended to get title that he might sell and dispose of the timber thereon, which
128 was its principal value and worth more than eight thousand dollars,—all of which fully appears in the testimony upon a contest inaugurated by Hill hereinafter given at length and in full and which was the testimony before the Commissioner and Secretary of the Interior, which they considered and upon which they based

their decision of fraud on the part of Jacobus in his entry and in making final proofs referred to and stated at length in said complaint.

The defendant further answering said complaint, alleges that on the 15th day of May, 1893, the Commissioners of the General Land Office addressed a communication to the register and receiver of the local land office at Ashland, Wis., in words and figures following, to wit:

E. Z. C. "C." DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, W. O. C. J. B. W. H. W. R. K. G.
WASHINGTON, D. C., *May* 15, 1893.

Register & receiver, Ashland, Wis.

GENTLEMEN: On July 6, 1892, Philip W. Jacobus made H. E. 3012 for the N. W. ¼ 17–48 N., 8 W., and on September 20, 1892, commuted the same to cash No. 5534.

The entry was made subsequent to the act of March 3, 1891,
129 and falls under the requirements of the sixth section thereof, whereby parties proposing to commute their homestead entries to cash must make proof of residence on and cultivation of the land for a period of 14 months from the date of the entry.

You will require the claimant whose address is given in final proof as Iron River to furnish supplemental proof without re-publication showing residence and cultivation for a period of 14 months subsequent to July 6, 1892, the date of entry, together with non-al affidavit.

You will notify the claimant at his last known address and report promptly any action taken.

Very respectfully,

EDW. A. BOWERS,
Ass't Commissioner.

Notice was duly given to said Jacobus as required in said order, and on the 19th day of June, the said Jacobus filed a motion to review the decision of said Commissioner as contained in said order, which motion was denied by the Commissioner on the 6th day of July, 1893. The decision of the Commissioner is in words and figures following, to wit:

65,470–93.

C. E. Z. C. DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, H. W. R. K. G.
WASHINGTON, D. C., *July* 6, 1893.

Register and receiver, Ashland, Wis.

GENTLEMEN: I have received your letter of June 20, 1893,
130 transmitting evidence of service of notice, together with motion for review and argument filed by N. B. Wharton & Son,

his attorneys in the matter of homestead entry 3012, made July 6, 1892, by Philip Jacobus for N. W. ¼, sec. 17, T. 48 N., R. 8 W., and commuted cash 5534 on September 20, 1892, which was suspended May 15, 1893, pending the making of supplemental proof showing claimant's residence on and cultivation of the land for a period of 14 months subsequent to the date of the original entry.

After a careful re-examination of the case and due consideration of the argument presented, I see no reason for receding from my decision. The statute clearly prescribes that parties proposing to commute their homestead entries to cash must show 14 months' residence and cultivation subsequent to the date of the entry. See sixth section, act of March 3, 1891, and 16 L. D., p. 285.

You will so notify the parties in interest, and that the requirements of office letter dated May 15, 1893, must be complied with.

Very respectfully, S. W. LAMOREUX,
Commissioner.

Thereafter, and on the 6th day of October, 1893, the said defendant duly filed his application to be allowed to contest the
131 entry of said Jacobus made July 6, 1892, which was duly forwarded, and was allowed by the Commissioner of the General Land Office on the 18th day of November, 1893, by his order in words and figures following, to-wit:

"H." DEPARTMENT OF THE INTERIOR, M. E. O. D.
107,519–92. GENERAL LAND OFFICE, T. W. A.
WASHINGTON, D. C., *Nov.* 18, 1893. J. W. W.

Register and receiver, Ashland, Wis.

GENTLEMEN: July 6, 1892, Philip W. Jacobus made H. E. No. 3012 for S. W. ¼ sec. 17, T. 48 N., R. 8 W., and was allowed to commute the same to C. E. No. 5534, Sept. 20, 1892.

Said commutation being premature, you were directed by my letter "C," May 15, 1893, to require supplemental proof which was forwarded by you Sept. 22, 1893.

October 19, 1893, you forwarded an application filed October 6, 1893, by John F. Hill, asking to be allowed to contest said entry.

Hill alleges in substance, by affidavits of himself and others, that the entryman never settled upon the said land in good faith to make it a home, but for the purpose of speculation, that he did not reside on the land during the six months next preceding the making of his proof, but instead lived at Iron River with his family,
132 where he kept a barber shop, and that he has sold the land to one W. E. McCord.

I find these charges are sufficient to warrant an investigation, therefore you are directed to order a hearing thereon.

You will allow Hill thirty days to apply for notice, and proceed in accordance with the rules of practice. Should he fail, however, to take further action in the time allowed, you will close the case

and return the contest affidavit, enclosed herewith, together with your report of proceedings had and evidence of notice as required by circular October 28, 1886, 5 L. D. 204.

Respectfully, EDW. A. BOWERS,
Ass't Commissioner.

That thereafter the said Jacobus moved for a suspension of proceedings upon the contest, which motion was denied. Such decision is in words and figures following, to-wit:

H. DEPARTMENT OF THE INTERIOR, M. F. O. D.
C. C. N. GENERAL LAND OFFICE, T. W. A.
107519–1893. WASHINGTON, D. C., *Feb'y* 24, 1894.

J. W. W.

65470–93	104519–93	
86486–93	108799–92	6899–94
97888–93	126152–93	7292–94

JOHN F. HILL
vs.
PHILIP W. JACOBUS.
} Involving Cash Entry No. 5534, Made Sept. 20, 1892, in Commutation of H. E. No. 3012, Made July 6, 1892, for N. W. ¼ Sec. 17, T. 48 N., R. 8 W.

133 *Motion for Review.*

Register and receiver, Ashland, Wis.

GENTLEMEN: December 18, 1893, counsel for Jacobus filed in this office a motion for review of office decision "H" of November 18, 1893, ordering a hearing in the above entitled case, upon the complaint of Hill, to the effect that "the entryman never settled upon said land in good faith to make it a home, but for the purpose of speculation; that he did not reside on the land during the six months next preceding the making of his proof, but instead lived at Iron River with his family, where he kept a barber shop; and that he has sold the land to one W. E. McCord."

This entry was suspended, and supplemental proof called for by letter "C" of May 15, 1893, for the reason that the commutation proof was prematurely made before the expiration of 14 months from date of entry (see case of Francis A. Lockwood, 16 L. D. 285), and a motion to reconsider said action was denied by letter "C" of July 6, 1893.

Sept. 22, 1893, you forwarded the corroborated affidavit of Jacobus and McCord, filed in your office July 12, 1893, as a response to the call for supplemental proof, and you also forwarded a protest by Hill against the acceptance of such supplemental proof, on
134 the ground that Jacobus had abandoned the land, that he had never resided on the tract, and that protestant had resided continuously thereon since July 12, 1891.

On August 22, 1893, counsel for Jacobus requested that no further action be taken relative to said entry until opportunity had been afforded him to communicate with his client.

Oct. 19, 1893, you forwarded Hill's application to contest filed in your office October 6, 1893, and upon consideration thereof a hearing was ordered by letter "H" of November 18, 1893, referred to above, of which action counsel for both parties were advised on the same day.

The motion for review is not strictly entitled to consideration because it was not served upon plaintiff as required by rule 76 of practice until January 18, 1894, after the attention of the attorney filing said motions had been called to the defect by letter "H" of January 13, 1894; but counsel for plaintiff have waived "any question of the time within which this service was made."

Said motion is based upon a number of affidavits denying the charges in plaintiff's complaint, evidence that plaintiff relinquished his right to the land in controversy in January, 1893, and a
135 plea that it was wrong to order a hearing without giving the entryman an opportunity to be heard after application had been made for time to confer with his client.

There is no merit in any of these contentions. It is entirely unnecessary that an entryman should be advised of an attack upon his entry prior to the time that notice of hearing is served upon him, and in this case nearly two months was allowed defendant's counsel to "communicate with his client" after request for such indulgence was preferred.

As to the other grounds for the motion, it is sufficient to say that it is manifestly impossible to satisfactorily determine by means of *ex parte* affidavits the truth or falsity of the charge made, and that a plaintiff need not claim any interest in the land in controversy, or even be qualified to enter. (See rule 1, practice.)

The motion is therefore denied, and you will proceed to carry out the instructions given in regard to to this case in letter "H" of November 18, 1893.

Respectfully,

EDW. A. BOWERS,
Ass't Commissioner.

Thereafter, and on the 20th day of April, 1894, due notice having been given, a hearing was had upon the questions raised upon the contest, and affidavits submitted by said Hill before the reg-
136 ister and receiver of the local land office at Ashland, and the following testimony was given and received, to wit:

JOHN SULLIVAN was called as a witness and being sworn testified as follows:

By Mr. SMALLWOOD:

Q. Where do you live, Mr. Sullivan?
A. Iron River.
Q. Are you acquainted with the northwest quarter of section 17, 48 north, range 8 west?
A. Yes I am.
Q. How long have you known this tract of land?
A. Since 1890.
Q. Are you acquainted with Philip W. Jacobus?
A. Yes sir.
Q. Who claims a homestead on that tract?
A. Yes, I am.
Q. How long have you known Jacobus?
A. I have known Jacobus since 1891, since February 20th.
Q. How far is your residence from this land?
A. My residence in Iron River?
Q. Yes.
A. About six miles and a half, I think.
Q. Did you ever live any nearer to this land than that?
A. Yes, I did.
Q. When, and how long?
A. For about seven months in 1891.
Q. How near?
A. I think I was 4 miles,—three or four miles.
137 Q. You passed pretty often in 1891?
A. Yes, sir.
Q. How often were you on this tract during 1891?

Objected to, for the reason that the notice of contest doesn't advise us that any evidence would be introduced touching the question of Jacobus' settlement except during the last six months preceding the making of the affidavit of contest.

The RECEIVER: You may answer.

Exception.

A. In the year 1891, for about seven months.
Q. Were you on it in 1892?
A. Yes.
Q. About how often?
A. Oh, about eight or nine times.
Q. During the year?
A. Yes, sir.
Q. Was that mostly in the winter or summer?
A. Well, both times, both in the winter, most in the summer, though.
Q. Most in the summer?
A. Yes, sir.

Q. Were you on the land during the year 1893?
A. Yes, I was there in the winter.
Q. How often?
A. Three times in the winter and three or four times in the summer of 1893.
Q. Do you know the house that Mr. Jacobus claimed as his homestead house on that claim?
A. I do, yes.
138 Q. At these different visits you made to the land were you at that house?
A. Sometimes I was, yes.
Q. I will ask you what time in the summer of 1892, what particular times you were on this land and at this house.
A. In 1892?
Q. Yes?
A. Well, I was at that house in May, 1892, and I was there in June, there in July. I was there in August, there in September and October, 1892.
Q. At either of these times did you see anyone living in this Jacobus house?

Objected to, for the same reason as stated before. Overruled. Exception.

A. Yes, I did one time.
Q. What time was that?
A. I think that was in June.
Q. 1892?
A. 1892.
Q. Who was there?
A. Mr. Jacobus.
Q. Anybody else?
A. I saw nobody else.
Q. Did you ever see him there at any of the other visits you made during that summer?
A. No, sir, I did not—not that I remember of.
Q. Are you acquainted with Mrs. Jacobus?
A. Yes.
Q. Did you see her there?
A. Yes, I saw her there just once.
Q. What time was that?
A. I think that was,—I saw her there in 1893.
Q. I want you to confine yourself to 1892 now.
A. I saw her there in 1892.
139 Q. About what time?
A. Mr. Jacobus made me acquainted with her in 1892. I think it was in July.
Q. How long were you there at that time?
A. Oh, just there a few minutes.

Q. Were you there again? Did you see either of them there again during the fall, 1892?
A. No, sir, I didn't.
Q. Now tell us about 1893?
A. Well, 1893 I came by there and seen Mrs. Jacobus there.
Q. What time?
A. I think it was in June. I don't know what time it was.
Q. What time of the year was it?
A. It was in June, about, say, from June—oh, last of June.
Q. You don't remember the exact date?
A. No, sir, I don't. She asked me if I was going to Iron River, and I said I was, and she wanted me to tell Mr. Jacobus to send her out a buggy, send a buggy out after her to bring her into Iron River; there was another gentleman with me by the name of Grimmer,—he carried the message to Mr. Jacobus.
Q. Did you take this message to Jacobus?
A. No, sir. I didn't; the other man did.
Q. Did you see her there again that summer?
A. No, sir, I didn't.
Q. Now, during the year, either the fall or winter of 1893?
A. No, sir.
140 Q. Did you see Mr. Jacobus there?
A. No, sir, I didn't.
Q. How often were you on the land in 1893, and at that house?
A. I was there, oh, I should judge about four or five times.
Q. Was that principally in the summer?
A. Yes, principally in the summer.
Q. I will ask you if you have been on the land during this year 1894?

Objected to as immaterial. Sustained. Question withdrawn.

Q. Now, tell us about what amount of land was cleared on this place. I mean by Jacobus or for him, during the year 1892?
A. Oh, an acre and a half or perhaps two acres.
Q. About the same in 1893?
A. Yes, sir.
Q. Was there some of it in cultivation?
A. Yes, there was.
Q. About how much of it?
A. Well, I should judge there might have been an acre all together with grass and potatoes.
Q. How much was in grass?
A. Well, about, I should judge, half the clearing.
Q. What kind of grass?
A. Timothy and clover.
Q. Do you know how that grass was put in?
A. Yes.
Q. How.

A. Well, the leaves was raked off and the grass shook on the ground.

Q. Was the ground plowed or spaded?

141 A. No, sir, not where the grass was planted, it was not.

Q. What kind of grass was it?

A. Timothy and clover.

Q. Timothy and clover?

A. I think so.

Q. How much of the land was in other crops?

A. Well, there was—had a patch of potatoes there.

Q. About how big was that—about how many rods square?

A. Perhaps a couple of rods square.

Q. Yes, was there the same state on the balance of the clearing; was it in a state of cultivation, had it been plowed or spaded?

A. No, sir, it wasn't; he had a bed there, was there also, and some cucumbers and a few other little garden truck.

Q. Was it necessary to do any grubbing there to put that land in shape for cultivation?

A. I should think so.

Q. Did you see any grubbing outside of the garden?

A. Outside of there he had the garden planted?

Q. Yes?

A. No, sir, I didn't.

Q. Was the land actually cleared,—was the underbrush all off?

A. Yes, the underbrush was all off.

Q. All the trees cut off?

A. No, sir.

Q. They was not?

A. They were not.

Q. Do you know whether there was any of them cut off—the trees?

142 A. Yes, I know the small trees was cut off.

Q. Were there some large ones standing in the clearing?

A. Yes, there was.

Q. How large?

A. Oh, all the way from a foot up.

Q. Some pretty good sized ones?

A. Yes, some of them good sized trees.

Q. What were they?

A. Pine trees.

Q. Do you know how many there was about?

A. There was 80 some odd.

Q. There was 80 some odd?

A. Yes, sir.

Q. All within this clearing?

A. Within the fence, yes; this enclosure.

Q. Do you know how many potatoes were raised there the fall of 1892?

A. I don't know, sir.

Q. Could you tell how many hills of potatoes there were?
A. I should judge there was probably fifty hills; might have been more, not much more.
Q. Was there some other garden truck?
A. Yes.
Q. What was it?
A. Oh, there was some cucumbers, and there was radish and lettuce.
Q. All within this small——
A. Within this enclosure.
Q. How many——
A. Within this two rods square?
Q. Within this two rods square?
A. Yes.
143 Q. Do you know whether any of this crop was harvested during the year 1892, Mr. Sullivan?
A. The hay was cut; yes, the hay was cut in 1892.
Q. And stacked, was it?
A. Yes, cut and piled up there in piles,—left on the piles on the land.
Q. Left on piles?
A. Yes, sir.
Q. Was never taken off?
A. Never taken off.
Q. Still there is it, what there was, what is left of it?
A. It was there in 1893; in the spring of 1893 I saw it there.
Q. Do you know what about the garden,—whether any portion of the crop raised in the garden was harvested?
A. No, I don't know anything about it; no, sir.
Q. Did you ever observe whether it was harvested or not when you passed?
A. I never did.
Q. Couldn't say?
A. No, sir.
Q. Now, please tell us about this summer last, the clearing, and what was in cultivation, and what crops, in the year *in* 1893?
A. There wasn't much of any change.
Q. About the same?
A. Yes, sir.
Q. Was there as much garden as there was there the year before?
A. Well, I don't think the garden was quite as big in 1893 as it was in 1892, but the grass was short the same.
144 Q. Was this little piece you call garden fenced in from the balance of the clearing?
A. No, it was not.
Q. The clearing was all fenced in together?
A. The clearing all fenced in one field.
Q. You don't know what crops were raised there in 1893, about the same, you think?

A. About the same, yes, I think.

Q. Any change in the trees in the clearing, any of them cut or removed?

A. No, sir, I couldn't say that there was any change, in 1893 any more than the hay was harvested in 1893, and hauled off.

Q. How long since you removed to Iron River?

A. I moved my family to Iron River in the spring of 1892.

Q. Do you know where Mr. Jacobus has been during the years 1892 and 1893?

A. Yes, I think he was in Iron River most of the time.

Mr. WARTON: I would like the witness to state what he knows, not what he thinks.

Q. Now, in 1892, was he in Iron River?

A. Yes.

Q. What was he doing?

A. Running a barber shop.

Q. Were you there most of the time, or were you away some during the summer of 1892?

A. I wasn't away very long.

Q. About how often during the summer of 1892 did you see Jacobus there?

A. I saw him there nearly all the time.

145 Q. Nearly every day?

A. Yes, most every day, or once a week anyway, 1893. I saw him there most every daytime in 1892, spring of 1892——

Q. Did you ever see Mrs. Jacobus there in 1892?

A. Yes, I did.

Q. Do you know whether they were keeping house there?

A. In Iron River?

Q. Yes?

A. What time?

Q. During 1892?

A. Well, it seems to me that they were.

Q. You are not sure as to that?

A. I can't say positive as to that in 1892.

Q. How is it about 1893?

A. '93 they were.

Q. They were keeping house?

A. Yes, in Iron River.

Q. Was he engaged in the same business there?

A. Yes, sir.

Q. How often did you see him?

A. In 1892?

Q. 1893 now?

A. Oh, I seen him there most all the time, have any business to go by his shop, generally seen him around there. Why, he was our town treasurer there, town treasurer town of Iron River.

Q. In 1893?

A. 1893, yes.
Q. Is that an elective office?
A. Yes, sir, an elective office, elected by the people.
Q. He was elected to that office?
A. Yes, sir.
Q. Is he still holding that office?
A. Yes, he was re-elected this spring.

146 Q. From your knowledge of the land, and from your knowledge of the defendant, his business and his family, what would you say,—would you say that he ever established or had an actual residence on the land in controversy,—what would you say?
A. I don't know what you mean by that?
Q. Well, then, I suppose you cannot answer it.
A. I don't know what you would call an actual residence.

The RECEIVER: Then you can't answer the question.

Q. You don't know what I mean by an actual residence?
A. No, I don't know what you mean by that.
Q. I asked you if you had a claim there; you said yes. You made proof on your claim?
A. I did, yes.
Q. What year?
A. In the fall of 1891.
Q. I will ask you, Mr. Sullivan, if after you made proof and had moved into Iron River, if you still continued to go back and forward to your land?
A. I did, yes.
Q. Well, in going there and returning from it, did you say it was on your route, this claim of Jacobus', and his improvements?
A. Yes, went right by his clearing.
Q. You had to pass there?

147 A. Yes, road goes right by his clearing, by road going to Iron River goes by his clearing.

Q. If there had been anyone occupying Jacobus' house at these times other than the times you have said you saw the defendant there, could you have seen them and known that they were there?
A. I should think I could.

Cross-examination.

By Mr. WHARTON:

Q. Where was your homestead?
A. Section 31–49–8.
Q. How far from the land in controversy?
A. I think it is about three miles,—3 miles and a half.
Q. North?
A. North—northwest.

Q. Did you always stop at Jacobus's house in 1891 when you passed there weekly?

A. No, not always.

Q. Did you ever stop there?

A. Yes, sir.

Q. When, what time in 1891 did you stop there?

A. I stopped there in 1891. I stopped there in March, and I stopped there in May and I stopped there in June and July, August, October.

Q. How do you know you stopped there in October?

A. Because I was out there, I know I did.

148 Q. Well, now, you passed there a great many times without stopping at all, didn't you?

A. Yes, sir.

Q. How do you fix it that you stopped there in March and May and June at the house?

A. Well, I used to inquire of the people that lived around there——

Q. I am not asking what you inquired of the people. I am asking how you fix it that you stopped at the house in March and May and June?

A. Because I fix the date, the date I used to go out there to my own place on those months.

Q. You went to your own place and returned to Iron River?

A. Went from Iron River and returned to Iron River, yes.

Q. During these months?

A. Yes, sir.

Q. How did you come to pass each week during all that period?

A. I used to come into Iron River and get my mail and get supplies.

Q. Now, I am trying to get at, Mr. Sullivan, how do you know that you stopped at the house during the months of March, May and June, and don't know that you stopped other occasions, stating that you passed there weekly?

A. I don't know what you are getting at. I don't understand you, Mister.

Q. (Reading question by reporter.)

149 A. Well, I know that I called at the house in March, because that is the first time. I know that I came there in March, 1891.

Q. That was the first time you passed there, was it?

A. First time, yes. No, a number of times there before that, but I didn't know who lived there; but afterwards I made inquiries to find out whose place that was.

Q. You was told Jacobus lived there, was you?

A. I was told it was Jacobus's place.

Q. You wasn't told he was living there?

A. No, sir.

Q. Now, what time in March did you stop at the house?

A. I think about the first of March.
Q. About the first of March.
A. Yes, sir.
Q. Snow was still on the ground at that time, pretty deep, wasn't it?
A. Yes, some still on the ground.
Q. And now did you stop at that house any time between that and May?
A. Yes, sir.
Q. When?
A. Stopped there at that house in April.
Q. About the first of April.
A. Yes, about the first of April.
Q. About the first of April.
A. Yes, sir.
Q. How do you fix these two dates as being the first of March and the first of April?
A. Well, I will tell you how to do that. I used to come about, you know, going there, and most of the settlers along the road
150 used to ask me if I had come down about the first of the month to see if there was any mail for them,—going to get their mail.
Q. You say you came every week, didn't you?
A. Yes, I came every week.
Q. And you inquired for mail every week, did you?
A. Yes, I used to put it in the box, John Hill's box; and I came to Mr. Jacobus's house.
Q. You say you put the mail in Hill's box?
A. Yes, and Augusta's on the road?
Q. On the Bayfield road?
A. Yes, sir.
Q. That was half a mile south of Jacobus's house?
A. Yes, but the mail that I used to get for several people there.
Q. You called that Hill's box. Do you know that mail didn't go there until July 1891?
A. I don't know.
Q. At the particular months, April, May and June, you were putting the letters in Hill's box, how do you know he was living in that —?
Q. At the particular months, April, May and June, you were putting the letters in Hill's box; how do you know he was living in that country?
A. I put it in Augusta's box.
Q. You made a mistake; it was Augusta's box instead of Hill's box; after the first of April, when did you next stop at that house?
A. I think I stopped there in June.
Q. Why didn't you stop every time you passed?
151 A. I didn't see anybody living there.
Q. You simply stopped when you saw somebody living there?

A. Well, sometimes I stopped when I didn't see anybody living there.

Q. You stated awhile ago you were there in May; now you state that the next time you were there after the *the* first of April was in June,—how do you reconcile those two statements?

A. Well, I went there, passed by there; naturally look over to see if anybody was living there.

Motion to strike out answer as not responsive to the question.

Q. You stated awhile ago that you were there in May, and now in answer to my other question you state that the first time you were there after the first of April was in June. How do you reconcile those two statements?

A. Well, the first time I was there I stopped at the house. I said I used to go by there often, but I wasn't always at the house.

Q. Then when you said awhile ago that you were at the house in May you didn't mean it; you simply meant that you passed by?

A. Perhaps so.

Q. Well, is that what you mean?

A. Yes, sir.

Q. Is that what you meant also when you said you stopped there the first of April?

A. No, sir.

152 Q. What time in June did you stop there at the house?

A. I think about the middle of June.

Q. Well, how do you fix that as the middle of June rather than the first of June?

A. Because I saw men working there.

Q. You saw a man working there; he might have been working there the first of June, might he not?

A. He might.

Q. Just as well as the middle?

A. Yes, but he was there planting, making some garden, doing some work.

Q. Garden can be made the first of June as well as the middle of that year, couldn't it?

A. Yes, I think it was about June I came in from Iron River; got some seed.

Q. Who was it doing that work?

A. I didn't know who the man was.

Q. Sure it wasn't Jacobus.

A. Yes, I am sure it ain't Jacobus; sure of that.

Q. And you stopped and had a talk with him, didn't you?

A. Yes, talked to the man.

Q. Told you who he was working for?

A. Yes, sir.

Q. Whom did he tell you he was working for?

A. Mr. Jacobus.

Q. Where was he doing the planting in relation to the house—what direction from the house?

A. I think it was south of the house.

153 Q. At that time, wasn't there a piece of land, east of the house, that was dug up?

A. Yes, a little piece.

Q. Did I understand you to say awhile ago that in 1891 there was only about two rods square dug up?

A. 1891?

Q. Yes?

A. About that, yes.

Q. ——.

—. No, I never did. Just judged it, guessed at it.

Q. Well, when did you give it particular attention to determine what size — was?

A. In 1891.

Q. What time in 1891?

A. I think it was in June.

Q. What did you give it particular attention? To determine just how much had been dug up?

A. I wanted to see what other homesteaders was doing as well as myself?

Q. That was your only object?

A. That was my only object.

Q. Well, now, what at that time did you determine to be its length and breadth, in feet say?

A. In the ground that was plowed up, broke up, shoveled up?

Q. Yes?

A. I should judge that probably two rods square, might be a little more.

Q. Was that at the time that you found this man at work that you made that calculation?

A. No, sir.

154 Q. Was it before that?

A. Yes, sir.

Q. Don't you know that after the day you saw this man working there in June there was more ground dug up there?

A. I think there was a little more.

Q. Then you don't wish to be understood as saying that in 1891 the only ground dug up was a piece about two rods square?

A. No, sir, I said it was a little more, might be a little more.

Q. And it was dug after you made that calculation, would still be more?

A. Yes, sir.

Q. And you think there was some more?

A. I do, yes.

Q. After the middle of June, when did you next stop at the house?

A. I stopped at the house again in August.

Q. That would be about two months after the other visit?
A. Yes.
Q. Find anybody there that time?
A. I believe I did.
Q. Who was it?
A. Mr. Jacobus.
Q. And his wife?
A. No, sir.
Q. Were you in the house?
A. I was not.
Q. His wife might have been in the house?
A. Why, she might be in there for all I know.

Q. Isn't it a fact, Mr. Sullivan, that when you passed by
155 each week and didn't stop that his wife might have been in the house?

A. She might have been.
Q. In passing along on that road, past the clearing, isn't it a fact that you pass several rods from the house, or did at that time?
A. Yes, sir. It is some distance from the house.
Q. And with the doors closed you couldn't see into the house from the road, could you?
A. No, sir, I couldn't.
Q. And if the door was closed and parties living there, the only evidence you would see would be smoke?
A. That is it, exactly it. Anybody living there, I would see the smoke except at meal time. A. That is all.
Q. Did you always pass at meal time or between meal time?
A. Various, different times, I was there sometimes meal times, and sometimes after mealtime, sometimes before.
Q. Did you, every time you passed, look to see whether there was any smoke coming out from the cabin?
A. No, sir, I don't believe I did, not every time. I had no occasion for it.
Q. Then, Mr. Sullivan, during 1891, Mrs. Jacobus, so far as you know, might have lived in that house almost continuously?
A. No, sir, I don't think she could.
Q. Well, why couldn't she?

A. Because I certainly would have seen her.

156 Q. If she had been in the house and the doors closed, and you passed every week, could you have seen her?

A. No I couldn't, unless she had the blinds down, and everything of that kind.
Q. If you only stopped there in March, April, June and August, and all other occasions you passed several rods from that house, and could only determine the residence by the smoke coming out of the stove pipe, don't you think that a party could have lived there during all of the time and you not really have known it?
A. No, sir, I don't think it could.

Q. Well, why not?
A. Because I would have seen it somewhere.
Q. Suppose they had been in the house when you passed, could you have seeu them?
A. I don't suppose a family would be in the house all the time.
Q. Well, that is my question exactly?
A. I didn't see them?
Q. And you don't know whether she was living there or not?
A. Why, no, I can't tell. If she housed herself up I couldn't tell if she was there or not.
Q. As a matter of fact, Mrs. Jacobus didn't run and greet you every time you passed, did she?
A. Certainly not; she had no occasion to.
157 Q. I believe you stated you came to Mr. Jacobus's on the 23rd day of February, 1892?
A. Yes, before, a few days.
Q. Before that?
A. 20th, I think.
Q. You did see him on the 23rd, didn't you?
A. Yes, sir.
Q. You and some others rushed him off the platform at the rear of the land office when he was trying to file, didn't you?
A. No, sir.
Q. You didn't?
A. I didn't, I would like to explain that.
Q. We will explain it when we get our witnesses on the stand, and show just what you did. From that day to this you have had a very strong feeling of enmity against him, haven't you?
A. No, sir, I didn't.
Q. And during all these times that you have been testifying to that you stopped at his house, you stopped for the purpose of seeing whether he or his wife was there, in order that if a contest occurred you could be witness against him?
A. No, sir.
Q. From the 23rd day of February, 1891, up to this time has Jacobus ever spoken to you?
A. Yes, sir.
Q. When?
A. Why, I used to shave in his shop in 1891 and 1892.
Q. In 1891 and 1892?
A. '82, shop in Iron River,—used to shave there.
158 Q. When was it you stated that he introduced his wife to you?
A. It was in 1891.
Q. What time?
A. I think it was in August.
Q. Where?
A. At his homestead out there.
Q. Did he go out and call you into the house for that purpose?

A. No, sir, he didn't.
Q. How did he come to make the introduction?
A. Why, passing by there, we talked there, one thing and another, the lady was there, he introduced me to her.
Q. Then they were both there at that time?
A. Yes, sir.
Q. Then when you made the statement in your direct examination that you never saw her there but once, you were mistaken, weren't you?

Mr. SMALLWOOD: Objected to trying to make the witness say what he didn't testify to.

Q. Didn't you in your direct examination state that you only saw her there but once in 1891?
A. I saw her there but once in 1891.
Q. Didn't you also in your direct examination state that at the time you were there in April, 1891, you saw her there?
A. I saw her there but once in 1891.
Q. Didn't you also in your direct examination state at the time you were there in April, 1891, you saw her there?
A. I don't think I did.
159 Q. And didn't you state in your direct examination that when you was there in May you saw her,—1891?
A. No, sir.
Q. And didn't you in your direct examination state that you saw her there in June, 1891?
A. No, sir.
Q. Then — it appears in your direct testimony it is not true, is it?
A. It is not. I know I saw her there once in 1891.
Q. When were you at the house, what part of August, 1891?
A. I was there in 1892.
Q. Not there again until 1892 from August, 1891?
A. Well,—oh, yes, I was there in the fall of 1891.
Q. Well, what time,—I am trying to get at that.
A. I was there in October.
Q. Wasn't Mrs. Jacobus there at that time?
A. In October, 1891?
Q. Yes, sir.
A. I didn't see her.
Q. Were you in the house?
A. No, sir.
Q. Were you in the clearing?
A. Yes, I was in the clearing in October.
Q. Were you up as far as to the door of the house?
A. No, sir, I was through the clearing.
Q. Went through the clearing, but didn't stop?
A. No, sir, didn't stop.
Q. Don't know whether she was in the house or not, do you?
A. I didn't see her in the house.

160 Q. Well, will you answer my question?
A. I don't know.
Q. When after October 1891 did you next stop?
A. I stopped there that winter.
Q. What time in the winter?
A. I think I stopped there in December.
Q. Are you sure of it?
A. Yes, sir.
Q. What time in December?
A. About the middle of December, as near as I can remember.
Q. Stop any other time during the winter?
A. Yes, sir; went by there again in January, went by there in February, 1891.
Q. Now, you understand the scope of my questions, whether you stopped there those times; you say you went by,—do you mean by that you stopped at the house?
A. No, sir, these other times I didn't stop at the house.
—. ——.
A. In the spring of 1892, I think I was there in May.
Q. Do you know it?
A. Well, that is as well as I can remember.
Q. You can't say positively whethor you was there in May or not?
A. No, that is the best of my belief, that I was there in May.
Q. Why do you believe it was May?
A. Because I went down there in May. I had other business there, other parties to meet out there in May. I went out to see them, had some business with them.
161 Q. Out where?
A. Where my homestead is.
Q. That is what you mean when you say "out there" all the time, is it?
A. Yes, sir. Out in that country.
Q. In passing there to your homestead in 1892, did you travel the road or did you go by Jacobus' house?
A. Most of the time travelled the road.
Q. Were you there any other time during the spring or summer of 1892?
A. Yes, sir.
Q. When?
A. I was there in July, June and July, 1892.
Q. June and July, 1892?
A. Yes, I was there in August.
Q. '92?
A. '92, and October, 1892.
Q. What time in June were you there?
A. It was about the middle of June, perhaps garden planting time.
Q. Jacobus was living there then?
A. I didn't see him.
Q. Didn't see him; were you at the house?

A. Yes, sir.
Q. In the house?
A. No, sir.
Q. What did you go up to the house for?
A. I was never in the house in my life.
Q. What did you go up to the house for that time?
A. Just to look around, see what was going on,—see what kind of a crop the man had planted.

162 Q. You were watching an opportunity to testify against him?

A. No, sir, never knew I would have to testify against him.
Q. In July were you at the house?
A. 1892?
Q. Yes?
A. I don't know. I am not certain about that.
Q. In October you were at the house?
A. I know I passed by the road in July.
Q. Well, you passed on the road frequently without stopping; that is, several rods from the house?
A. Yes, sir. But I am not certain whether I was at the house or not in July, 1892.
Q. Are you certain whether you were at the house or not in October, 1892?
A. Yes, I am.
Q. That is a pretty good house, isn't it?
A. Yes, a nice house; house is all right.
Q. Well, fixed in good shape to be lived in at that time?
A. Yes, 1892, yes.
Q. The clearing at that time was very nicely done, wasn't it, except those big pine trees?
A. Yes, sir.
Q. And it would have been waste to cut those down, wouldn't it?
A. I should judge so.
Q. In other words, they were valuable as merchantable timber?
A. Yes, I should consider them so.
Q. That grass grew very nicely there, didn't it, in 1892 and 1893?
A. Yes, sir.
Q. Made into fair hay?
A. Made nice grass.

163 Q. In fact, Mr. Sullivan, didn't it make just as good a crop as if the ground had been plowed up before it was sowed?

A. Well, I couldn't think it did.
Q. Don't you know as a matter of fact, that any place there in the woods, where there is a little place cleared, that the grass seed gets in there and grows luxuriantly?
A. Yes, sir.
Q. Finely?
A. Yes, sir.
Q. As well as it will grow anywhere in the country?

A. Yes, after the first year.
Q. And in 1893 the crops there, grass was very good, was it not, over that section of the country?
A. Yes, pretty good, dry year, average.
Q. Did you state that this clearing was fenced in?
A. Yes, sir.
Q. That fencing you found there in 1891, didn't you?
A. Well, I wouldn't say for certain. I am not certain about that, whether it was in 1891 or the spring of 1892.
Q. You are certain it was in 1892 and 1893?
A. Yes, I am certain it was in 1892 and 1893; that I do know.
Q. Did you ever measure that clearing?
A. No, sir, I never did.
Q. Don't you know that that clearing was enlarged in the summer of 1892, and the spring?
A. I believe it was a little bit.
164 Q. Isn't it a fact that it was enlarged to the extent of half an acre?
A. I don't know; can't say.
Q. What would you judge to be the dimensions of the clearing as it was, say, October, 1893?
A. What size clearing within the enclosure?
Q. Yes?
A. I should say probably an acre and a half or two acres.
Q. That ain't my question. I am asking for the dimensions of the clearing. We will make the computation ourselves,—how many rods long and how many rods wide?
A. I don't know, never measured that, can't tell you.
Q. How do you arrive at the amount of the land embraced in the clearing?
A. Just guessed at it.
Q. Simply a guess?
A. Yes, sir.
Q. And in regard to the amount, you may be somewhat mistaken?
A. Oh, I might be, yes, more or less.
Q. You did see potatoes, cucumbers, beans, lettuce, radishes and flowers growing there, both in 1891 and 1892?
A. Yes, sir, and in 1893.
Q. '92 and 1893?
A. Yes.
Q. They seemed to be well taken care of, didn't they, while they were growing?
A. Yes, sir.
Q. Well, wasn't that an indication that somebody was living there and making a home?
165 A. Yes, seemed as though there was somebody around there some time.
Q. Did I understand you to say you never was in the house?
A. I never was in the house in my life; no, sir.

Q. Did you ever see what was in the house?
A. Never did, no, sir.
Q. In addition to the house, there was a porch in front, wasn't there?
A. Yes, 1892.
Q. Wasn't there in 1891?
A. I don't think it was; no, sir.
Q. Now, you stated that you were there in July, 1891. I will ask you a direct question: Wasn't that porch there at that time?
A. In July, 1891?
Q. Yes, sir.
A. I didn't notice it.
Q. I think you made some statement in your direct examination to the effect that you thought Mr. Jacobus in 1892 lived in Iron River village?
A. Yes, I think he did.
Q. Now, just give us the exact reasons you have for thinking so?
A. '92?
Q. Yes.
A. Summer of 1892?
Q. Yes, sir.
A. The reason why, that he run a barber shop there.
Q. Couldn't he run a barber shop there without that being his residence?
A. I don't see how he could.
Q. Isn't it a fact, Mr. Sullivan, that homesteaders in that
166 country had to go out somewhere to earn money to live on?
A. Some of them do, yes; a great many of them do.

GEORGE HELMER was called as a witness, and being duly sworn testified as follows:

Mr. WHARTON: Do you understand the nature of an oath?
A. Yes, sir.
Q. What would be the result if you swear falsely? You don't know, do you?
A. I think I would tell a falsehood, that is all.

The RECEIVER:

Q. Do you know what the result of telling a falsehood is in this case in court? Do you know whether there is any punishment?
A. Yes.
Q. What is the punishment, in a general way; what do you think would happen?
A. I suppose I would be punished for it; what would happen likely.

By Mr. SMALLWOOD:

Q. In what way; how would you be punished if you were found to be guilty of having sworn falsely,—do you know?
A. I don't know; might be sent to the reform school.
The RECEIVER: How old are you?
A. 16 years.
The RECEIVER: Proceed.

By Mr. SMALLWOOD:

167 Q. George, where do you live,—do you live in the town or in the country?
A. In the country.
Q. What is the nearest town?
A. Iron River.
Q. Do you know the land claimed by Mr. Jacobus as a homestead, and which Mr. John F. Hill is contesting here? Do you know this land in dispute?
A. Yes, sir.
Q. How far do you live from this piece of land?
A. I should think about two miles.
Q. You don't know what section it is in, do you?
A. No, sir.
Q. Simply know the land?
A. Yes, sir.
Q. Do you know where the house and clearing are that is claimed by Mr. Jacobus?
A. Yes, sir.
Q. Have you been there frequently?
A. No, sir, not very frequently.
Q. But you have been there often enough to know it?
A. Yes, sir.
Q. I will ask you if in December, 1892, you made any trips from your father's farm out there to Iron River and back?
A. Yes, sir, we did.
Q. What did you go for, George?
A. We went for the mail and to sell vegetables.
Q. Did you sell any vegetables at Iron River? Did you sell in the village of Iron River?
A. Yes, I did.
168 Q. Among others, did you sell to Mr. Jacobus?
A. I sold some to Mrs. Jacobus, yes.
Q. Where were they then?
A. In the McCord block.
Q. In the McCord block; this was in the latter part of the year 1892, was it?
A. Yes, sir.
Q. Are you sure it was about then?
A. Yes, sir.

Q. What kind of vegetables did you sell there?
A. Some beans, pickled beans.
Q. Were you there again in January, 1893?
A. Yes, sir.
Q. What were you doing there then?
A. I done washing—mother done washing, and I took it out.
Q. Out from Iron River, you carried it?
A. No, sir.
Q. You carried down to them the washing, or did you take it out from there?
A. I took it out from there, and then I took it back again; brought it back again with a dog and sleigh.
Q. Was that for Mrs. Jacobus?
A. Part of it was.
Q. How often did you go there during January?
A. I went every week, sometimes every two weeks.
Q. And sometimes every two weeks?
A. Carried washing to be washed and taking it back.
169 Q. How long did you make these trips; how long did you keep that up, carrying this washing?
A. From the first of January till the latter part of April.
Q. Latter part of April, 1893?
A. Yes, sir.
Q. Now, you were in the house then, were you, where they were living in Iron River?
A. Yes, sir.
Q. On each of these trips?
A. I didn't, every time I go there.
Q. Didn't every time; well, did you go in sometimes or most of the times?
A. Most of the times, yes.
Q. What, if anything, did you see in the house?
A. I seen two cushioned chairs, two rocking chairs with cushions on them.
Q. Anything else?
A. A lounge, heating stove.
Q. Yes?
A. Center table.
Q. Did you ever see any cooking stove?
A. Yes, in the kitchen.
Q. Did you ever see Mr. or Mrs. Jacobus at work about the house, doing anything at any of these times?
A. I seen Mrs. Jacobus.
Q. What was she doing some of these times when you were there; do you remember any particular thing she seemed to be doing?
A. No, sir, she didn't seem to be doing anything.
170 Q. Ever see her doing any work at all of any kind?
A. No, sir.

Q. Did you ever see him, Mr. Jacobus, doing any work about the house?
A. I did, once.
Q. What was he doing?
A. Washing dishes.
Q. He was washing dishes,—this was in the McCord block in Iron River?
A. Yes, sir.
Q. Do you know about what month that was, or don't you remember?
A. I don't remember.
Q. You couldn't tell what particular visit that was you saw that?
A. No, sir.
Q. Did you see any kitchen furniture or any cooking utensils or anything of that kind around, outside of dishes?
A. Yes, sir.
Q. All the ordinary things that people use and have in their house when they are housekeeping?
A. Yes, sir.

Cross-examination.

By Mr. WHARTON:

Q. I believe you stated that it was December, 1892, that you sold Mrs. Jacobus some beans?
A. Yes, sir.
Q. Were they dried beans, or green?
A. They were pickled beans, put down.
Q. Pickled?
A. Put down, yes.
Q. What time in the month did you say that was?
A. I couldn't say just what time in the month it was.
171 Q. How do you fix the date as being in December?
A. Because that was the time I started to do washing, shortly after.
Q. Shortly after that started to do washing?
A. Yes, sir.
Q. And that is the reason you know it was in December?
A. Yes, sir.
Q. Got through selling vegetables, beans; did you sell her beans more than once in December?
A. No, sir, I didn't.
Q. Did you ever make any memorandum of this business?
A. No, sir, I didn't.
Q. Did you make a date anywhere of the time your mother commenced washing for Mrs. Jacobus?
A. No, sir, I didn't.
Q. Now, as a matter of fact, George, there was only one time that you got washing from Mrs. Jacobus,—isn't that true?

A. No, sir, it is not.

Q. And isn't it a fact that you didn't return her all the clothes that you got at that time?

A. Didn't? No, sir, it is not.

Q. What did you take up to be washed?

A. I can't mention everything; there were sheets and pillow-cases and different things.

Q. And you took them all back that you got?

A. Yes, sir.

Q. Every one?

A. Yes, sir.

Q. Did you keep the number of the articles?

172 A. Why, yes; kept the number until we took them back again.

Q. How many of them were there?

A. Well, I don't remember.

Q. How many times did you carry clothing from Mrs. Jacobus' to be washed?

A. I don't remember the number of times; every week or so.

Q. Do you remember of doing it more than once, George?

A. Yes, I do.

Q. Did you carry them more than twice?

A. Yes, I did.

Q. Well, can you give us about, approximately, an idea of the number of times you did carry them?

A. Well, carried them every two weeks from the beginning of January to the latter part of April; snow was gone.

Q. That would be January, March and April, three months?

A. Every two weeks.

Q. And February, four months?

—. ——.

Q. That would be about seventeen weeks; then you would make eight trips, going once in two weeks?

A. Yes.

Q. After that you didn't do—your mother didn't do any washing for Mrs. Jacobus?

A. No, sir.

Q. Since April, 1893, George, you have made a business, haven't you, of watching around to see where Mrs. Jacobus was?

173 Objected to, as an improper examination, nothing whatever having been asked the witness about anything which happened subsequent to April, 1893, and ask and insist that in all these cases where such stuff is put into the record that the other side pay for it, because I am going to, at the end of this case, and give notice now, if there is any such immaterial evidence, going to make a motion for taxation of costs:

The RECEIVER: You can answer, George.

A. No, sir, I have not.
Q. Have you seen her since that time?
A. Yes.
Q. Frequently?
A. Not frequently, no, sir.
Q. How often have you seen her in that time?
A. Once is all.
Q. Once, when was that?
A. Yesterday. I saw her on the street and seen her in the house.
Q. When was that?
A. Yesterday.
Q. Then between April, 1893, and yesterday, you have not been watching around to see where she was?
A. No.
Q. Who asked you to come here to testify?
A. Come here to testify?
Q. Yes.

The RECEIVER: To be a witness.

A. Mr. Hill did.
Q. When?
A. I couldn't tell you just what date; about four days before the trial.
Q. Do you mean about four days ago?
A. Yes.
174 Q. Told you what he wanted you to swear to?
A. Told me that he wanted me to swear to what I seen.
Q. And what you had done about the beans and the washing, and told you he wanted you to tell that, did he?
A. No, sir.
Q. Didn't; what was it that he wanted you to state that you had seen?

Objected to, as attempting to intimidate the witness, and as wholly improper and not cross-examination, proper for no purpose whatever.

By Special Agent ALLEN:

Q. Do you know Dr. Cullum?
A. Yes, sir.
Q. How far do you live from him?
A. I should think about a quarter of a mile.
Q. You have been in the habit of going out to his house frequently, have you not?
A. No, sir, not lately.
Q. Not lately; well he isn't there now, but you did it when his family was there?
A. No, sir.

Q. Didn't you go there every day, nearly every day; didn't you go up to Dr. Cullum's house and go into his door and look in and around the door, and he told you not to do it?

The RECEIVER: I don't think that has anything to do with this case,—nothing whatever.

Mr. ALLAN: I simply wanted to show that this was a busybody.

175 A. No, sir.

The RECEIVER: I think it is entirely improper.

By Mr. WHARTON:

Q. Did he tell you what he would pay you for coming here?
A. No, sir.
Q. Did he tell you he would pay you anything?
A. No, sir.
Q. Did he pay your way here?
A. Yes, sir.
Q. Then you came voluntarily, without any promise of pay whatever?
A. Yes, sir.
Q. Did you expect any pay for it?
A. Yes, sir.

12 o'clock m., case adjourned to 1:30 p. m.
1:30 p. m., case resumed pursuant to adjournment.

Re-direct examination:

By Mr. SMALLWOOD: During the dinner hour I have talked with the witness, George Helmer, and he wishes to correct one statement he made as to the times when he had seen Mrs. Jacobus and been to the house recently.

Q. George, I think in your direct examination, probably in your cross-examination, you referred to the fact that you had been to the Jacobus house in Iron River, once, lately—is that correct, or do you wish to correct that?
A. Yes, I do.
Q. Have you been there more than once?
A. Yes, I have been there twice.
176 Q. Tell us when those two times were?
A. About a week ago; and I was there the day before yesterday.
Q. Did you see Mrs. ——?
A. No, it was yesterday.
Q. Did you see Mrs. Jacobus both times?
A. Yes, sir.
Q. How did things look there, compared with when you last saw the house—is it about the same?
A. They was just the same.

Recross-examination.

By Mr. WHARTON:

Q. Were you in the rooms the day before yesterday?
A. No, sir.
Q. Were you in, the other visit you spoke of?
A. Yes, sir.
Q. What room was you in?
A. Kitchen.
Q. Kitchen?
A. Yes, sir.
Q. Were you in any other room?
A. Yes, sir.
Q. What other room was you in?
A. I didn't notice what it was. I went through the kitchen into another room.
Q. Were they the same rooms that you had been at the time you was selling beans and getting washing there?
A. Yes, sir, one was.
Q. One was; which one?
A. Kitchen.
Q. The other one was not, was it?
A. No, sir.

177 LEONARD HILL was called as a witness, and being duly sworn testified as follows:

By Mr. SMALLWOOD:

Q. Where do you live, Mr. Hill?
A. Out in the woods.
Q. Near what section?
A. On section 17, town 48, range 8.
Q. Are you the son of contestant, John P. Hill?
A. Yes, sir.
Q. How long have you lived out there, Leonard?
A. Three years this summer.
Q. How long?
A. It will be three years this summer.
Q. Are you acquainted with the place known as the Jacobus place?
A. Yes, sir.
Q. One claimed by Jacobus as a homestead?
A. Yes, sir.
Q. How far is your father's house from the Jacobus house?
A. About half a mile.
Q. Have you been there very often during the year 1893?
A. Yes, I was there quite often.

Q. About how often?
A. Oh, two or three times a week.
Q. Were you there during the year 1892, subsequent to the 6th day of July, 1892?
A. Yes, sir.
Q. About how often during that year?
A. Oh, I was there every week, pretty near.
Q. You think, would average at least once a week?
A. Yes, two or three times a week.
178 Q. During the year 1893, and subsequent to July 6th, what, if anything, did you see of Mr. Jacobus or his wife upon the claim? How often did you see them?
A. Well, I couldn't say just how often.
Q. Try and remember the particular times when you saw them; give us the best of your recollection of it?
A. Well, they were there in raspberry time,—they were there in raspberry time.
Q. And some other time, did you say?
A. I don't remember just how many times they were out there.
Q. Saw them there, as a general rule, when you went to the house, or past there?
A. No, sir.
Q. What was the general rule; were they there or absent?
A. Well, more times they wasn't there.
Q. What was the amount of land in cultivation, in your judgment, in the year 1892?
A. Oh, there was some hay, grass seed, sowed, and there were fifty hills of potatoes.
Q. Did you ever count the hills?
A. No, I never counted them exactly, but I should think about that many.
Q. Can you tell what an acre of land is by looking at it, pretty near?
A. Well, no, not exactly.
179 Q. Well, can you tell approximately what would constitute an acre from looking it over?
A. Oh, yes.
Q. Well, was there one acre or more cleared?
A. I should think there was.
Q. Think there was more?
A. A little more.
Q. How much; what part of the land cleared was in grass seed?
A. What part of it?
Q. Yes, what proportion of it, one-third, or what?
A. Oh, I should think there was about half of it,—the west half.
Q. About what was the size of the garden,—about how many square rods either or each way?
A. Well, there was some in north of the house. Oh, I should think a couple of rods square.

Q. What was planted in it?
A. Potatoes.
Q. Anything else?
A. Oh, there was lettuce and cucumbers, and there was a garden bed near the house.
Q. Did you ever see anybody planting there?
A. I don't know as I did.
Q. Did you ever see anybody cultivating the *the* ground in that clearing, doing any hoeing or digging or other work which indicated cultivation, during the summer of 1892?
A. Not that I remember of.

Q. Do you know whether that crop of 1892 was ever har-
180 vested or not?

A. The crop of 1892; yes, the grass was cut.
Q. The grass was cut?
A. Yes, and stacked up and lay there, and lays there now.
Q. In one stack?
A. No, in little shocks.
Q. Little places around there, shocks around there?
A. Yes, sir.
Q. Well, what about the garden, was that harvested?
A. I think the potatoes were dug; yes, they were dug.
Q. Do you know how many potatoes were raised?
A. No, not exactly, I don't. I should think there were a couple of bushel, two or three bushel.
Q. How did the cultivation of the ground in 1893 compare with what you have testified to as in 1892?
A. There wasn't so much; wasn't more than half as much.
Q. Wasn't more than half as much; how was it as to the grass,—about the same?
A. Yes, it was cut about the same.
Q. About the same amount in area?
A. Yes, about the same; it was cut and taken off.
Q. Did you see anybody planting anything there in the year 1893?
A. No, sir, I didn't see them; but I heard that they were.
Q. But you saw things growing there?
A. Yes sir.

Q. So that you knew they had been planted; did you see
181 anybody cultivating the crop in 1893, there?

A. No. sir.
Q. Do you know what about the crop—whether it was harvested or not in 1893?
A. Yes, it was cut off; Mr. Kenney cut it.
Q. You refer to the hay?
A. Yes sir.
Q. How about the garden; was that harvested, do you know?
A. I don't know, I am sure.

Q. Now how often during the two seasons, 1892 and 1893—when I speak of seasons I refer to the growing seasons of crops, the summer time—how often during the summer of 1892 and 1893, about, were you on the Jacobus place, or near the premises, so that you could observe them?

A. Well, sir, I was there quite often, because I used to pasture the cows there, adjoining there.

Q. Did you say about how often it was?

A. Well, sometimes I was there every day and sometimes I was there two or three times a week. When I was at home.

Q. But not so often in the winter?

A. No, sir.

Q. When you were there so frequently in 1893 did you ever see Mr. Jacobus or his wife there occupying the premises?

A. Yes, I seen them.

Q. Do you remember when and how often?

A. No, sir, I don't, exactly.

182 Q. Can you tell very nearly how often?

A. I know they came out there one day, her and another woman, and picked berries; stayed a few days.

Q. Then again?

A. I don't know when they were on after.

Q. Do you know of their being there as many as two or three times during the summer?

A. No.

Q. From the frequency with which you visited the place, and passed over the premises and near the house, would you say that that place was occupied as a residence by anyone during the years 1892 and 1893?

A. Well, they wasn't there much that I see, nor see any signs of anyone.

Q. If they had been there, would you have been able to see them from your visits there?

A. Yes, of course; I wasn't in the house.

Q. Was it the general rule that they were there and the exception that they were away, or was it the general rule that they were absent and the exception was when they was there, which?

A. Well, sir, more times they wasn't there.

Q. Did you ever carefully observe that clearing on the Jacobus place? Claimed as the Jacobus clearing?

A. No, I don't know as I did.

183 Q. I don't mean as to the area. I mean as to the character of the work there had been done on it?

A. Yes, sir.

Q. You have not observed it carefully as to the area?

A. No.

Q. Have you as to the work that had been done on it?

A. Well, how do you mean?

Q. Could you tell what had been done in the way of clearing by passing over it?

A. Yes, sir.

Q. Well, had it all been underbrushed?

A. Yes, sir.

Q. What proportion of that clearing had never been grubbed, or put in state of cultivation?

A. Well, it was all underbrushed, and the one part of it, the big trees stood.

Q. Inside the clearing?

A. Yes, sir.

Q. About how many trees; did you ever count them?

A. I don't know as I ever did. I should think, though, there would be about 70 to 75 trees.

Q. Were these large or small trees?

A. Big trees.

Q. Do you know how that grass was planted,—whether the ground was spaded or plowed up before it was put in, or how it was put in?

A. It wasn't plowed or spaded, the grass and leaves raked off, and what was on the ground.

Q. Where the garden was planted were there any big trees growing?

A. No, sir.

184 Cross-examination.

By Mr. WHARTON:

Q. From July 6th, 1892, to the end of that year, how did it come that you passed by this place on an average about two or three times a week?

A. Because I was driving the cows over there.

Q. You found better pasture there than elsewhere?

A. Yes, there was a place seeded there. That year used to go to Augusta; go there quite often.

Q. The clearing of Augusta and Jacobus joined together, do they not?

A. Yes, sir.

Q. So that you could see from one house to the other?

A. Yes, sir.

Q. Did you herd your cattle there yourself? Stay with them the whole day?

A. No, sir, I didn't stay with them all day. Just drove them up in the morning and left them there.

Q. The raspberry season, as you speak of, would be the latter part of July and the fore part of August, would it not?

A. Well, sometimes it is. I ain't sure just when it would be.

Q. Don't you know whether those few days that Mrs. Jacobus was there in raspberry season was in August or July?

A. I couldn't say which it was, just to the time, no.

Q. I believe you stated that you see her there in the latter part of July, 1892?

185 Mr. Ross: I don't think he made any such statement.

A. No, sir. I didn't.

Q. She was living there in the house, wasn't she?

A. Not that I know of.

Q. Where did you see her?

A. I didn't see her.

Q. How did you make the statement, then?

A. ——

Q. Do you understand the question?

A. Yes. In July.

Q. Yes. You answered my question that you did state that you saw her there in July?

A. I didn't.

Q. Then you wish to be understood that you didn't see Mrs. Jacobus at her place there in July, or the latter part of July, 1892?

A. Yes, sir.

Q. And if you made any statement in your direct examination it wasn't correct?

A. Yes, sir.

Q. The question on direct examination was put to you touching the 6th day of July, 1892, and subsequent thereto; did you see Mrs. Jacobus there on the 6th of July, 1892?

A. I can't say whether I did or not?

Q. Where were you on that day?

A. I can't tell where I was.

Q. Did you see her there in August, 1892?

A. No, sir.

186 Q. Were you at the house during July or August of 1892?

A. Well, I was there quite often that way, more or less.

A. At Jacobus' house?

A. Yes, sir.

Q. What for?

A. Well, I used to have our cows up there; cows used to feed up that way.

Q. Do you wish to be understood that you were pasturing your cows on Jacobus's place?

A. No, sir.

Q. Well, now, my question relates to the fact of whether you was at Jacobus's house?

A. Well, I was there, yes, more or less, all through the month, I couldn't swear to any dates.

Q. And were pasturing your cows across on Augusta's claim?

A. Yes.

Q. Why did you go to Jacobus' house?

A. I never used to go into the house. I went by the house, though.

Q. Do you go by the house in traveling the road back and forth there, do you not?

A. Yes, sir.

Q. That is several rods from the house, isn't it?

A. A little ways, yes, few rods.

Q. And as a matter of fact there might be somebody living in that house and you passing along the road and not know that there was anybody living there?

A. Well, there would be some signs of life there if there was anybody living there.

187 Q. What signs?

A. Well, there would be smoke out of the chimney, and curtain would be up.

Q. Suppose warm weather, don't have any fire?

A. Curtain up then; wouldn't be the curtain down.

Q. Always have the curtain up if they are there, do they?

A. Yes.

Q. How do you know?

A. Because I was by there and seen.

Q. Been by there all the time that they was there?

A. Well, I have seen them there and they have the curtain up; when they are away they have the curtain down.

Q. Haven't you seen them there when the curtain was down?

A. No, sir.

Q. Might have seen them there at that time, for all you know?

A. Might have, for all I know, yes.

Q. As a matter of fact, when you were driving your cows back and forth over the road there at the edge of the clearing Jacobus might really have been living in that house and you not know it?

A. Must have lived pretty quiet, then.

Q. Well, will you answer the question,—he could live there and you not know it?

A. Well, I don't know whether he could or not.

Q. You don't know anything about it, do you?

188 A. Yes, I known that all right.

Q. As a matter of fact, you were doing, all that time, watching Jacobus to see whether he was living there, weren't you?

A. No, sir, I was not watching Jacobus.

Q. Had no other cause than the simple fact of driving your cows back and forth?

A. No, sir.

Q. Wasn't paying any attention to the question of whether Jacobus was living there or not?

A. Well, no, not really, I didn't come up there for that purpose.

Q. Which side of the house did you say that the potatoes and garden patch was in 1892?

A. I said two rods, couple of rods.

Q. Which side?

A. On which side? Well, was the north side.

Q. Don't you know that in 1892 that there was a piece of ground cultivated directly east of the house, between that and the fence?

A. I don't know whether there was or not.

Q. You didn't pay enough attention to remember whether there was or not, did you?

A. No. It seems to me that there was, too.

Q. If there was you don't count that in your estimate of two or three rods square that was cultivated, do you? That two or three rods that you referred to that was north of the house, and

189 had no reference to any land east of the house?

A. No.

Q. Then if there was cultivation east of the house, that was so much in addition to what you spoke of?

A. Well, if it was there.

Q. I believe you stated you didn't see her there in August, 1892?

A. Yes, sir.

Q. Did you see her there in September?

A. No, sir.

Q. Do you remember the occasion of getting some milk for Mrs. Jacobus when she was there sick, on the claim?

A. Me getting milk?

Q. Yes.

A. I don't know, I might have. I got quite a number of things for her. I don't remember.

Q. Do you know,—if you did get her milk when she was sick, do you have any idea when it was?

A. No, sir.

Q. If it should prove to be in August, 1892, then your statement you didn't see her there in 1892 would be a mistake, would it?

A. Yes.

Q. Do you remember getting quite a number of things for her while she was living there, don't you?

A. I got things for her, yes, when she was there.

Q. When were those times?

A. I don't know. I can't say for sure. I don't remember.

Q. Did you observe, in 1892, that there was some cultivation immediately around the house?

A. No, sir.

190 Q. Now, wasn't there some cultivation in 1892, west of the house, between the house and Augusta's clearing.

A. Not that I seen.

Q. If there had been any would you have seen it?

A. Well, I should think I would, yes.

Q. You were looking to a-certain where there was cultivation of the soil, weren't you?

A. No, I don't know as I was.

Q. Now, where was that cultivation in 1893 that you speak of?

A. 1893?

Q. Yes, which side of the house?

A. Well, there was potatoes in east of the house, and some north of the house.

Q. Wasn't there some west of the house also, some cultivation there, garden vegetables?

A. I didn't see any,—there was a garden bed west of the house, right by the window.

Q. And wasn't there in 1893 some cultivation in front or south of the house?

A. I don't know.

Q. How far did the clearing extend east of the house?

A. Couple of rods.

Q. Isn't it a fact that the house stood very near the center of the clearing each way?

A. Pretty near, a little to the east of the center.

Q. West part of the clearing was in meadow?

A. Yes, sir.

Q. And it was in the west part, you say, these trees were growing?

A. Yes, sir.

191 Q. You never counted them?

A. I never counted them, no, sir.

Q. And isn't it a fact that in making up your estimate of 75 trees, or such a matter, on there, that you make that out from the testimony that you heard this morning of Mr. Sullivan?

A. No, sir.

Q. You didn't give that?

A. That is my own estimation.

Q. Been any timber cut in the last year, has there?

A. No, sir, nothing but the small trees.

Q. The same number of trees now that were there a year ago?

A. Yes, sir.

Q. There was some clearing done there in the summer season of 1892, wasn't there?

A. Yes, sir.

Q. Could you tell about how much?

A. Well, I should think half an acre—pretty near it.

Q. What direction from the house was that clearing?

A. North.

Q. Do you know what time in the season that was done?

A. No, sir, I don't exactly.

Q. You didn't see anybody doing that clearing?

A. Yes, sir.

Q. Did you; well about what time was it? Was it after planting season?

A. I don't know. I don't remember just when it was. Along through the summer sometime.

192 Q. As a matter of fact, your memory isn't very good as to dates, is it?

A. Well, I can't remember dates; no, sir.

Q. It is mere guesswork on dates?
A. Yes.
Q. Was it in 1893 that you stated that Mrs. Jacobus and another lady were out there several days picking raspberries?
A. '93, yes.
Q. Could you state whether that was in July or August?
A. No, I couldn't; it was in raspberry time. I don't remember just when it was.
Q. How many days were they there; do you know?
A. Oh, I don't know—few days.
Q. What do you mean by a "few days"?
A. Two or three days.
Q. Two or three,—don't you think they were there as much as a week?
A. Well, I don't know exactly how long they were there.
Q. You don't know how long they were there; might have been there much longer than a few days, for all you know?
A. Well, they wasn't there much longer than a few days, three or four days; wasn't there any length of time.
Q. I believe you stated that you saw no one doing any cultivation there in either 1892 or 1893?
A. Yes, sir.
Q. Were you pasturing your cattle there from July 6th up to the close of the season, all the time?
A. Not all the time; but they used to go there much of the time.
Q. Oh, in 1893, they went there most of the time, did they?
A. Yes, sir.
193 Q. You were aware from your visits there that the land was being cultivated each year, wasn't you?
A. Well, yes, some of it.
Q. Do you remember the occasion of going hunting with Mrs. Jacobus?
A. Yes, I remember.
Q. Can you tell when that was?
A. No, sir, not exactly.
Q. Went more than once, didn't you?
A. I guess so, more than once; once or twice.
Q. Well, now, was that it 1891, 1892 or 1893?
A. I don't know, I can't tell which it was. I have been up there hunting with her, but I don't know just exactly when it was.
Q. You say that you think there was about 50 hills of potatoes there in 1892; that is just guesswork, is it?
A. About that, yes.
Q. Did they cover all this space that you speak of, two rods square?
A. I don't know. I don't remember whether they did or not; there was quite a little piece in there sown to lettuce.
Q. Didn't Mrs. Jacobus get you to do some work there in 1893?
A. Yes, sir.

Q. What did she pay you for doing it?
A. I think she gave me a dollar.
Q. When was that? What time in the year?
A. During the summer time.
Q. She was there at that time, wasn't she?
A. Yes, sir.
194 Q. That wasn't the time she went there to pick berries, was it?
A. I don't know, I cut some wood down there; it was in the summer though.

Re-direct examination.

By Mr. SMALLWOOD:

Q. These times you say that you carried things for her or did errands for Mrs. Jacobus, was during 1892 or 1893, or both years?
A. Both.
Q. Isn't it a fact that when she came out there she always called on you to do errands for her, whatever she had to do?
A. No, not always. I cut wood for her once or twice.
Q. When she came out there, how did she come, generally?
A. Came with a buggy.
Q. In a buggy?
A. Two seated buggy,
Q. She generally came that way, did she?
A. Yes, two seated rig.
Q. One horse or two horses to it?
A. Two horses.
Q. Two horse team?
A. Yes, sir.
Q. Do you know whether those animals, those horses, belonged to Mr. Jacobus or Mrs. Jacobus?
A. I know they didn't.
Q. Pretty well acquainted with the stock around in that country neighborhood, ain't you?
A. Yes sir.
Q. You know the stock belonging to the different neighbors? Many of these on the farm, don't you?
A. Yes.
195 Q. During all the time that you have known the defendant and his wife, have you ever known — to have on that place a single head of stock of any character whatever of their own?
A. Never have.
Q. Never known them to have on that place a single head of stock whatever except the horses that hauled them out with the buggy?
A. No, sir.
Q. Have you ever known them to have even a chicken or a turkey or a goose, any kind of birds or poultry on the place?
A. No, sir.

Q. Never have?
A. No, sir.
Q. How is it with other neighbors that generally have such things?
A. Well, yes, one neighbor in there got chickens, and one pigs.
Q. How about horses and other stock?
A. Well, got horses,—that is, one horse?
Q. Most of them have some stock of some kind, don't they?
A. Yes, sir.
Q. Some poultry or something of that way?
A. Yes, sir.
Q. If they had ever owned or kept any such things on the place you could certainly have seen them, couldn't you?
A. Yes, I could.
Q. Did you go to Iron River very often in 1892 or 1893?
A. Yes, quite often.
Q. Did you ever see Mr. Jacobus there?
A. Yes, see him in the barber shop?
196 Q. How often?
A. Oh, I have seen him most every time I went out to town.
Q. Did you ever go to his shop?
A. Yes, I have had a shave and a hair cut there.
Q. How old are you, Leonard?
A. Twenty years old. I will be 21 the 28th of May.
Q. Nearly twenty-one years. Did you ever see Mrs. Jacobus at any of these trips to Iron River, in Iron River?
A. Yes, sir.
Q. Where did you see her?
A. Seen her in the shop, and I seen her in the McCord block.
Q. In what block?
A. McCord block.
Q. McCord block. Whenever you would go to town, or generally when you went to town, did you see Jacobus at the barber shop?
A. Yes, sir.
Q. Seem to be the regular thing, did it?
A. Yes, sir.
Q. You have been asked on cross-examination about garden west of the house; what was there planted in that garden?
A. West of the house?
Q. Yes?
A. I didn't see any garden west.
Q. You didn't see any there at all?
A. No, sir.
Q. All that was planted in that other patch and bed which you have referred to, do you know?
A. There was a bed of flowers.
Q. Flowers there, wasn't it?
A. Yes, that was all I remember.

197 Mr. Ross: West of the house, or east of the house?
A. West.

Objected to, two counsel having the witness at once.

By Mr. WHARTON:

Q. Isn't it a fact that in 1892 Mrs. Jacobus gave you cucumbers from the garden?
A. '92.
Q. Yes?
A. Yes, sir.
Q. When did you see her in the McCord block?
A. I seen her right after the building, not very long after the building was built; seen her washing a window.
Q. Well, I want to know when it was, I don't know when the building was built.
A. I didn't keep the dates; it was right after it was built. I don't know when it was built.
Q. Was it in 1891, 1892 or 1893?
A. '92.
Q. You think it was in 1892?
A. I think it was.
Q. What time in 1892, fall of the year?
A. I don't know whether it was in the fall or summer.
Q. Don't you know, as a matter of fact, that the town of Iron River burned up in July, 1893?
A. It was in July.
Q. Was it after that you saw her there?
A. After that.
Q. How long, several months?
A. Yes, sir.
198 Q. After that date Jacobus made final proof, wasn't it?
A. After the date?
Q. Yes?
A. I don't know. I don't remember whether it was before or after.
Q. What homesteader out in that neighborhood had a horse?
A. Mr. Basett.
Q. Any other homesteader out there got a horse?
A. Yes.
Q. Who?
A. Mr. Eggleston, got two, and so has Mr. Kenney.
Q. Mr. Kenney is a lumberer, isn't he?
A. Yes; and so has Mr. Schootmueller.
Q. He is a lumberman isn't he; he goes to the lumber camps in the winter—works?
A. Yes.
Q. And Mr. Eggleston does the same, doesn't he?

A. No, Mr. Eggleston don't. Eggleston is the agent fixing stoves on the road.

Q. Has his horse for the purpose of driving with in his business?

A. I suppose so.

Q. There isn't much use for a horse there on these homesteads until the land is cleared up. is there?

A. He works it in the summer when he was there. In the summer time he stays on the homestead.

Q. Doesn't have much use for his horse, does he?

A. Yes, he works him some.

Q. About what proportion of the time?

A. Ain't working much. Worked last winter, both of them; got three horses there now.

199 Q. When was it you saw Mrs. Jacobus at the barber shop at Iron River,—that in 1892 or 1893?

A. When I seen her?

Q. Yes, at the barber shop?

A. I don't remember when it was. I seen her there both years, I guess.

Q. Might have been October, 1893, might it not?

A. I seen her in 1892 too.

Q. Were you ever in her house there on the claim?

A. No, sir.

Q. In her house?

A. Yes, sir.

Q. Well, fixed up in there, wasn't it?

A. Yes it was.

CHARLES HELMER was called as a witness, and being duly sworn testified as follows:

By Mr. SMALLWOOD:

Q. Are you acquainted with the land in the controversy here known as the Jacobus claim?

A. Yes sir.

Q. Contested by Mr. Hill?

A. Yes, sir.

Q. How long have you known it?

A. Going on four years.

Q. How near do you live to it?

A. Two miles.

Q. How long have you lived that near to it?

A. I have lived there three years.

Q. Are you acquainted with Jacobus?

A. Not much; no sir.

Q. Do you know him by sight?

A. Yes, sir.

Q. How long have you known him by sight?

A. Ever since.

200 Q. During the three years?

A. Yes, sir.

Q. Do you know Mrs. Jacobus when you see her?

A. Well, hardly.

Q. Have you been on this land in controversy quite often since the time you settled out there?

A. Yes, sir.

Q. About how often each year?

A. On and by there.

Q. About how often on an average each year have you been on the premises, near the house and to it?

A. I couldn't give the correct times. Probably 25 times a year.

Q. You think it would be safe to say 25 times a year for each of the three years?

A. I do, yes.

Q. During all that time can you say how many times you have ever seen the defendant Jacobus on the land he claims?

A. Once to my recollection.

Q. How many times did you ever see his wife there?

A. Why, I see a couple of ladies there once. I don't know as it was his wife; couldn't say as to that.

Q. From your knowledge of the premises what would you say; would you say that the Jacobus house has ever been occupied as an actual residence during the past three years?

A. Not as an actual residence, no sir.

Q. How much of the land has been cleared by Jacobus or by men employed by him?

201 A. At the present date?

Q. Yes.

A. Oh, an acre and a half or two acres.

Q. Did Jacobus put improvements on this land himself, or did he hire them done, or did he purchase them?

A. Well, I say he hired them done, all but the building of the house. I think part of it was purchased.

Q. Did you ever see him at work on the place?

A. No, sir.

Q. Have you ever seen any crops growing on the place, Mr. Helmer?

A. Yes, sir.

Q. What have you seen each year,—we will confine ourselves to 1892 and 1893,—during those seasons?

A. Well, in 1892, I could specify the different crop. In 1892 I saw some hay there, but in 1893 there was a small patch of potatoes, my recollection, and some hay.

Q. About the same amount of hay?

A. Yes, sir.

Q. What was done with the hay crop in 1892, do you know?

A. No, I don't. I saw it standing heaps there for a long time.

Q. Do you mean after it was cut down?
A. Yes. I don't know what was done with it.
Q. You don't know whether it was ever removed or not?
A. No, sir, I don't know anything about it; never paid any attention to it.
202 Q. Do you know whether the garden that was grown there in 1893 was ever harvested or not?
A. I don't.
Q. About how large an area was in this garden?
A. About two rods, two square rods, I should judge. I couldn't say how many hills of potatoes there were, but to the best of my recollection Mr. Hill counted the potatoes—there was 23 hills, I think.
Q. Did you ever see any potatoes taken from that ground after they had matured; know anything about the size of the potatoes that was raised there?
A. No, sir.
Q. How about the other vegetables that grew there; did they fully mature?
A. I didn't notice any. I didn't notice any.
Q. About what size is this clearing, in your judgment?
A. Full clearing about an acre and a half or two acres.
Q. Was any part of that done in the year 1893?
A. Not as I know of.
Q. Any part of the year?
A. There might have been some done.
Q. Do you know whether any — done in 1892 or not?
A. Yes, it was all done in 1892, mainly.
Q. Do you know what time in the year it was mostly done?
A. No, I couldn't say just what time of the year it was done along in '92, '91–'2; '91, after the first contest they began the clearing.
203 Q. '91 and '2?
A. Yes, sir.
Q. Do you know about how many trees, if any, are standing inside of this clearing.
A. Why, I should have to make a rough guess at it.
Q. What would you be safe in saying that there were.
A. Safe in saying thirty, I should think.
Q. That is a large or small tract?
A. Large.
Q. What kind of trees?
A. Pine trees.
Q. With that number of trees standing on so small a place, could the ground be so cultivated, Mr. Helmer, from your experience in that country, as to make it produce a full crop?
A. No, sir.
Q. Would it produce half a crop?

A. It wouldn't in my neighborhood, no, sir; not on my place it would not.

Q. During all the time that you have been there, and been familiar with these premises, have you ever seen any horses, cattle, sheep, pigs, or any kind of stock that are usually kept on a farm, on the Jacobus place?

A. No, sir.

Q. Have you ever seen any poultry of any kind?

A. No, sir.

Q. Not even chickens?

A. No, sir.

Q. If any of these animals had been kept there would you have been able to see them or know of it?

A. Certainly would, yes.

Q. I will ask you whether the neighbors around there usu-
204 ally keep cows and some other animals and such things?

A. Those that came in there to farm did, yes; with the intention of making it their home there.

Q. The rule applies to actual settlers?

A. Actual settlers, I should say yes.

Q. How often did you go to Iron River during the years 1892–3?

A. Well, quite often; it would be too numerous for me to mention.

Q. How far is it from your place?

A. Six miles.

Q. Do you pass the Jacobus place in going?

A. No, sir.

Q. You don't necessarily pass it going that way?

A. No, sir.

Q. At the different times that you have been at Iron River what proportion of the time did you see Jacobus there?

A. Well, greater portion.

Q. Do you know what he was doing in Iron River?

A. I do.

Q. What was it?

A. Barbering, running a barber shop.

Q. Do you know whether or not he was keeping house there?

A. Yes, I do.

Q. Well, was he?

A. Yes, sir.

Q. Do you know that he was engaged in any other pursuit
205 or business or occupation besides the barber shop, or have any other sign or indications of other business about his premises?

A. Well, yes; he has a notice stuck up out on the walk, "Laundry done here."

Q. Do you know whether or not the defendant has during the years 1892–3, or either of those, held any official position,—'93 and the present year there held any positions, any office?

A. Oh, yes, he has.

Q. What office?

A. Treasurer, I think it is.
Q. Is that an elective office?
A. Yes, sir.
Q. Elected by the people?
A. Yes, sir.
Q. Is there anything, any sign at his barber shop, to indicate that he holds any office, or did you know, did you observe it?
A. I didn't see it.

Cross-examination.

By Mr. WHARTON:

Q. Iron River and the land are both in Iron River township, are they not?
A. Yes, sir.
Q. Then in 1893 he was elected treasurer of the township in which the land is located?
A. Yes, sir.
Q. And during the tax season of that year he has had his office in Iron River, where he collected the taxes?
A. '92.
Q. '93?
A. Yes, he kept his residence there all the time, I guess, all right enough.
Q. You state that you have been out in the woods there about three years; in that time you have appeared very frequently at this office as a witness in contests?
A. Yes, I have.
206 Q. And in all the cases where the question of prior settlement was involved in the case you have appeared as a witness against the prior settler, alleged prior settlement?
A. I have, yes,—I will take that back; not all. I was there on, in favor of the prior settler.
Q. You have two contests of your own with Mr. Drummond, I believe, in this office in that time?
A. Yes, sir.
Q. And had a contest with Mr. Vullum, which has been tried twice?
A. Yes, sir.
Q. Is it not a fact that in the case of Thomas Lowe against Abe Johnson and others you have made affidavits in the interest of the defendants?
A. I have.
Q. And in the case of Henry M. Smith against Abe Johnson, etc., you have made affidavits in the interest of the defendant?
A. Yes, I have.
Q. You have taken quite a conspicuous interest in a great many cases, haven't you?

A. Yes, but not near enough.
Q. You have become quite expert as a witness?
A. Nothing expert about me at all, only that I would like to see justice done if I could.
Q. What times during the summer season of 1892 was you at the residence of Jacobus on this homestead?
A. I could not mention the dates. I wouldn't give the dates.
207 Q. Wouldn't state even the month?
A. No, I would not state the month that I was in there, but I was in there about every month.
Q. In this case, like a great many others, you are anxious to make a good witness for the man who called you to testify,—now, you testified awhile ago, if I mistake not, that some year- there was 23 hills of potatoes there, as counted by Mr. Hill. How do you know?
A. Because I was with him.
Q. And you didn't count them?
A. No, I didn't count them.
Q. But you put yourself under oath and swear that there was 23 hills because he counted them?
A. No, sir, I heard him count them, and I looked at the patch myself, but I didn't count them at all. I could tell very close.
Q. You don't know whether he counted them all or not?
A. I could tell very close, but I never counted.
Q. Will you answer the question?
A. No, sir.
Q. That ends it, then.

Mr. SMALLWOOD: He answered the question by saying he didn't count them.

Q. My question was, that you don't know whether he counted all the hills or not?
A. No.
Q. What direction from the house is that potato patch?
A. It is southwest.
208 Q. What year was that?
A. 1893.
Q. Was there any cultivation north of the house in that year?
A. Not as I noticed.
Q. Did you make any investigation for the purpose for ascertaining whether there was or not?
A. I didn't.
Q. You have stated that you knew that Jacobus lived in Iron River village,—what time did you refer to?
A. What time that I refer to that he lived there?
Q. Yes, at Iron River.
A. I never knew him to live any place else than Iron River and West Superior.

Q. But that is not an answer to my question. You stated in your examination in chief that you knew that he lived in Iron River?
A. Yes, sir.
Q. What time have you reference to?
A. All the times that he has been there, all the time that I have been there.
Q. You mean since 1891 he has lived in Iron River?
A. What time he didn't live in Superior, yes.
Q. He lived a portion of the time in Superior, did he?
A. Yes, sir.
Q. How did you know?
A. Because the records will show for that.
Q. I am asking you how you know?
A. Well, that is all the way I know that.
Q. Where did you examine any records?
209 A. Not hard to examine, right here at the office—at this office.
Q. Is there any record of this office showing that he was in 1891 a resident of West Superior?
A. I think it is, yes.
Q. When did you see that record or hear it read?
A. I have heard the case going on, heard it tried.
Q. Will you state when?
A. '91.
—. What time in 1891?
A. I couldn't say just; I couldn't give you the date.
Q. Do you mean the case of Jacobus against Hill?
A. Yes, sir.
Q. Do you know whether that was in the summer time or fall of 1891?
A. Oh, yes, I know that. I think it was in May. I wouldn't give you just the date.
Q. Then you heard somebody state that he lived at West Superior, did you?
A. Yes, sir.
Q. And that is the reason that you state under oath that he is living at West Superior?
A. I know he didn't live on the farm; that I know.
Q. I am getting at what you stated? You stated that he lived in West Superior, and that is the only way you knew it?
A. That is the only way I know it.
Q. And you know that he lived in Iron River in the same way, do you?
A. Oh, a little better knowledge than that.
210 Q. What other knowledge have you?
A. Well, because my wife labored for them.
Q. When?
A. That was in 1893.
Q. What time?

A. Latter part of 1892–3.
Q. What time?
A. Winter.
Q. How did you find out that she worked for Jacobus's?
A. I would naturally know that, because she told me,—that is how I found out.
Q. She told you?
A. Yes, sir.
Q. That was the only means you had of knowing that, wasn't it?
A. Yes.
Q. That the only way you had of knowing that they lived in Iron River during the winter of 1892–3?
A. No, that ain't all.
Q. Now, what other means have you of knowing that fact?
A. Because I see him there.
Q. See his wife there?
A. See her there in the barber shop; yes, and hear people tell Jacobuses live there, and so on, etc.
Q. But, as a matter, of fact, you never saw Mrs. Jacobus keeping house in Iron River, did you?
A. No.

JOHN F. HILL, contestant, was called as a witness in his own behalf, and being duly sworn testified as follows:

By Mr. SMALLWOOD:

Q. Are you acquainted with the land in controversy, Mr. Hill, here?
A. Yes, sir.
211 Q. Describe it.
A. Northwest quarter of 17–48–8.
Q. Are you acquainted with the defendant, Philip W. Jacobus?
A. Yes, sir.
Q. How long have you known Mr. Jacobus?
A. Since first I got acquainted?
Q. Yes?
A. I should say 12 or 15 years.
Q. Where do you live?
A. I reside on the northwest quarter of 17–48–8.
Q. How long have you lived there?
A. Three years last July, that is, three years, I should say, coming July, July 1891. I went there in July 1891.
Q. Has anyone else resided on that quarter section of land since the 6th day of July, 1893, or until now, except yourself?
A. No, sir.
Q. Do you know where the Jacobus house is and improvements claimed by Jacobus?
A. Yes, sir.

Q. How far are they from your improvements?
A. They are inside of half a mile.
Q. About how often during the year 1893 were you on that part of the quarter section where his improvements are, and about how often were you on those improvements or near them, so as to be able to observe them?
A. I was there pretty regular.
212 Q. Could you say approximately the frequency of your visits?
A. Well, three or four times a week. I watched it pretty close.
Q. You were looking out, were you, to see if anybody was there?
A. Yes, sir.
Q. You was somewhat interested in it?
A. Yes, sir.
Q. Living there.
A. Yes, sir.
Q. Was it your object to find out if he was complying with the law?
A. Yes, it was.
Q. Now, during the year 1892, how often did you see him on that land?
A. Once—'92, you said.
Q. Yes, how often in 1893?
A. I saw him there last Sunday, is the only time.
Q. On the claim?
A. Yes, sir.
Q. '93, I am asking you about? '93; it is '94.
A. I will take that back.
Q. '93, how often?
A. '93, he wasn't there at all.
Q. He might have made some visits there without you seeing him?
A. No, sir.
Q. Could anybody have lived in that house, so as to cook and eat and sleep there, without you knowing it?
A. No, sir; couldn't.
Q. How often did you see Mrs. Jacobus there in 1892?
A. '92, she came out the 24th day of June and went back the next day again,—her and another lady. Then she came back. I have got the minutes in my pocket.
213 Q. If you have any memorandum of her visits you may refer to it.
A. I have got it down in black and white.
Q. I will first ask you, however, if this memoranda was made at the particular times that the dates are given there?
A. Same day.
Q. Referring to your memorandum, state how often she was there in the year 1892, Mr. Hill.

A. Came out on the 24th day of June, came two days. (Referring to memoranda.) Came out again on the first day of August with two other ladies.

Q. How long did they stay?

A. Mrs. Jacobus stayed until the 11th day of August.

Q. When was the next visit? Was there any other visit in 1892?

A. No other visit in 1892.

Q. What about 1893; how often was Mrs. Jacobus out to the place?

A. Not at all.

Q. How did she usually come when she came out?

A. With a livery rig.

Q. What do you mean by a rig?

A. Well, span of horses and buggy.

Q. Will you look at your memorandum and see if you find any record of her being there in 1893? Look at the year 1893.

Objected to, for the reason that the witness has been testifying from memorandum, and has said that she was not there in 1893.

A. Have you been talking about 1893 or 1894?

214 Q. 1893?

A. I am a little hard of hearing. I can't understand.

Q. Refer to the year 1893; look at the memorandum and see what you find about her visits there in 1893; is there anything?

A. She came out on the 15th day of November, 1892, and didn't come back again until the 24th day of June, 1893.

Q. Didn't come back from where?

A. From Iron River.

Q. Onto that claim?

A. Yes, in 1893.

Q. Did you ever see Mr. and Mrs. Jacobus there at the same time?

A. He used to come after her.

Q. He would come after her?

A. This time I speak of when he came after her on their place, stayed two days, came out again first of August, stayed two days. Jacobus came out with two rigs with some folks from Iron River on Sunday, Augusta 6th, 1893.

Q. What were they doing there then; do you know?

A. Mrs. Jacobus and this lady back here came out picking raspberries.

Q. Do you know of any time when Jacobus or any party was out there with some beer; do you know anything about that?

A. Yes, this Sunday I speak of.

Q. Is that the same time you were speaking of?

A. That is the time,—two rigs.

215 Q. All this time, during 1892 and 1893, where was Jacobus and his wife actually residing?

A. At Iron River.

Q. How do you know?

A. Well, I see them occasionally there, and saw her going out with the horse. I never was in their rooms personally; common talk with everybody that they lived there.

Q. Was he engaged in any business there?

A. Yes, sir.

Q. Describe the land cleared there, as near as you can.

A. What year?

Q. In 1892 and 1893, what was the extent of the clearing each year?

A. '92, most of the clearing was done in the year by two parties, summer of 1892.

Q. Who were they?

A. Man by the name of Coughman, and Carter.

Q. Do you know who employed them?

A. Mr. Jacobus did; told me. I was talking with the men myself.

Q. And do you know what was done in the way of clearing in 1893?

A. No clearing done in 1893, except what Mr. Ball done; a little underbrushing for them on that clearing.

Q. There has been none done since that?

A. No, sir.

Q. Now, what was the character of the work done on this clearing. Just tell what was done?

216 A. Underbrushed and small trees cut out. Large trees all remain there yet.

Q. About how many large trees are on that clearing? Did you ever count them?

A. '89, I have counted them.

Q. How much of the land, if any was, ever plowed, or grubbed or spaded up.

A. Might have been hoed up somewhere. They hoed the potatoes, the rest of it was not.

Q. How much of it was cultivated in 1892 to vegetables?

A. There was some hay planted there, hay seed.

Q. About how much?

A. I should say half or three-quarters of an acre.

Q. Were these the only things grown on the land in 1892.

A. That is all.

Q. Do you know whether the 1892 crop of hay was harvested?

A. Yes, it was cut and left, left; lays there right where it was cut; piled in bundles and lays there today.

Q. Do you know whether the garden crop of 1892 was harvested?

A. Yes, those potatoes were dug in 1892.

Q. Do you know what became of them?

A. They were carried away in a sack. Mrs. Jacobus passed by my house with some in a sack.

Q. Do you know how many of those potatoes there were, Mr. Hill?

A. I should say, by the look of them, I saw them in the wagon, a little over, near a bushel.

217 Q. What other vegetables besides potatoes were raised on that little patch of ground?

A. Not any, only there was a little patch of cucumbers; most of them lays there, right there. Wasn't used.

Q. How did the crop of 1892 compare with the crop of 1893?

A. There was no potatoes planted at all that grew; there was some 23 hills put in there. It was too late for anything to come to maturity.

Q. None of the crop of potatoes matured at all in 1893?

A. No, sir.

Q. During all the time that you have lived there and visited the place have you ever seen any sign of Jacobus there?

A. No, sir.

Q. You have never known of any farm animals of any kind whatever, or any poultry of any kind having been kept on the place, or any being in the neighborhood that was owned or claimed or known to be the property of Jacobus?

A. No, sir, there was not.

Q. During all the time that you have known this land have you ever, except at these times that you have mentioned, the other visits to the land, seen smoke issuing from the house, seen any indications of its being inhabited, such as doors open or the window blinds up, or such as chips around where they would cut firewood, or any other of the indications of habitation there?

218 A. No, sir. None, with the exception of one night that Mr. Wylie and another man stayed there.

Q. Are you a married man, Mr. Hill?

A. Yes, sir.

Q. How much of a family have you?

A. I have five.

Q. Is your family with you out there?

A. Yes, sir, some of them have been all the time.

Q. Did you make some improvements on this land?

A. Yes, nice improvements.

Objected to as immaterial.

Q. What is the extent of your improvements?

Objected to, as immaterial, and that his residence and improvements on the land is a question of *res adjudicata*.

The RECEIVER: I don't think it is material.

Mr. SMALLWOOD: Counsel for contestant here offers to show the character and extent and value of Mr. Hill's improvements, the contestant's improvements, the extent of his continuous residence on the land; not for the purpose of showing any prior right to the land over Mr. Jacobus, as that seems to have been settled, but for the purpose of showing that this contestant is not a mere claim

jumper, running around the country to jump anyone's claim, but that he has brought this contest in good faith, because he felt
219 that he had some equities in the matter that has not been determined by the legal adjudication of the other case, and to show his good faith as well.

Mr. WHARTON: It is a matter of record in this office and the General Land Office, in the case of Jacobus against Hill, which reference has been made to heretofore in this case, that this contestant was a claim jumper, and so found by the Commissioner.

The RECEIVER: The objection to the admission is sustained.

By Mr. SMALLWOOD:

Q. Did you ever count those trees on that clearing, Mr. Hill?
A. Yes.
Q. How many were there?
A. I made 39.
Q. Now, those trees scattered over the entire clearing, or were they most in one part of it?
A. They were scattered over most of it.
Q. Now, it is possible for the soil on that area of ground to be cultivated between that number of trees in such a way as to produce a fair crop?
A. Not generally.
Q. What kind of a crop would it produce,—half a crop, or more?
A. I wouldn't say it would produce half a crop in the state.
Q. On account of the shade?
A. On account of the shade.
220 Q. About how often have you gone to Iron River during 1892 and 1893?
A. Well, I have not kept track, pretty often.
Q. I said about how often. I didn't suppose you would know the exact number of times.
A. In the neighborhood of once a week.
Q. Think it would average that?
A. Yes.
Q. Well, did you ever see Jacobus there during your visits?
A. Yes, most every day, week.
Q. Most every time you visited it?
A. Yes.
Q. Do you know what he was doing there?
A. Yes.
Q. What was he doing?
A. He was in a barber shop, shaving.
Q. Did he do all his work himself, or did he have help in his barber shop?
A. Do you mean other—no help besides himself.
Q. Do you know whether he kept house in Iron River or not?
A. That I suppose.
Q. You don't know?

A. I can't say positive. I never was in the house. Must have lived some place; couldn't have lived out where he should have been.

Q. As a matter of fact, did Jacobus ever have at any time a residence on this land in controversy?

A. No, sir, to say a home.

Cross-examination.

By Mr. WHARTON:

221 Q. In 1892 you kept very close watch of this land, did you?

A. Yes, sir.

Q. You also did that in the year 1893?

A. Yes, sir.

Q. What is your object?

A. I have lots of it in view.

Q. Please state them.

A. Watch and keep track of them.

Q. For what purpose?

A. For many purposes.

Q. Please explain what that purpose was?

A. To see how often he was on that claim; he claimed it as his home there.

Q. Had an entry there, and you knew that?

A. Yes.

Q. Well, you had some object that you have not stated, haven't you, in watching him so closely during those two years?

A. In what respect?

Q. You had an object in watching him, hadn't you?

A. Yes, had a big object.

Q. Well, will you state what it was?

A. I have stated to you.

Q. That was your only object, to see how often he was going there?

A. To prepare myself, yes.

Q. Was it your intention during all that time to contest him if he didn't live upon the land?

A. Yes, sir.

222 Q. And that was your object, then, in watching it closely?

A. Yes, sir.

Q. Mr. Hill, you made a relinquishment of all right, title and interest to that land at one time, didn't you?

Objected to as not the best evidence.

Q. I ask the witness to answer the question.

The RECEIVER: I think the question is proper.

Mr. Ross: Objected to as not the best evidence, and involving a question of law, and calling for a conclusion of law.

The RECEIVER: It is a mere matter of fact whether he did or not. Objection overruled. Exception.

Reading question.

A. No, sir.

Mr. Ross: Objected to, on the further ground that it is absolutely immaterial.

Objection overruled. Exception.

Q. Did you not, on the 4th day of January, A. D. 1893, before W. H. Packard, a notary public, sign a paper in which you relinquished to the United States all your right, title and interest to that land?

A. I say no sir; that is plain.

(Paper introduced in evidence as Jacobus's Ex. A.)

Objected to as immaterial.

A. That there is a fraud, that stamp put on, and I can prove it.

223 Mr. WHARTON: The defendant Jacobus offers in evidence Exhibit "A," for the purpose of showing that this contestant cannot, after signing such a paper, in good faith bring a contest against the entry of the defendant Jacobus.

Objected to as wholly immaterial.

The RECEIVER: I don't see that this has anything to do with the present case. I rule that it is immaterial.

Mr. WHARTON: Defendant excepts to the ruling of the receiver on the objection, and insists on the filing of the exhibit.

Q. What time in 1892 did you first see Jacobus or his wife on this land?

A. 1892.

Q. Yes.

Mr. Ross: Objected to as having already been answered. I will refer to the minutes.

Mr. WHARTON: I object to your testifying from a book.

A. I can answer you just the same as I did before.

Q. What was your answer before?

A. I said before, I can't remember.

Q. You cannot even remember what you testified to half an hour ago, can you?

A. Did I understand you, in 1892?

Q. I say, you can't remember what you testified to half an hour ago?

A. I can, yes.

224 Q. What did you state was the time that you first saw Jacobus or his wife on the land in 1892?

A. Did I say 24th day of June?
Q. I am asking you what you said?
A. That is what I say.
Q. 24th day of June, was that; how do you fix that?
A. Yes. From the dates I had marked down in this book.
Q. When did you mark them in the book?
A. On the 24th day of June.
Q. 1892?
A. Yes.
Q. Where at?
A. At my place, there.
Q. At your place?
A. Yes.
Q. That is half a mile from Jacobus's is it?
A. Yes.
Q. Who was present?
A. Well, my wife was there.
Q. Anybody else?
A. Children.
Q. What time in the day did you mark it?
A. I didn't carry a watch. I couldn't tell exactly what time it was—daylight.
Q. Was it possible that they had been on the land before that during that season?
A. No, sir, it was not.
Q. How do you know?
A. Because I was watching it.
Q. Every day?
A. Mostly.
Q. Well, did you watch it every day?
A. I didn't say I did.
225 Q. You said you knew that he couldn't be on the land before that season?
A. Yes, I did.
Q. You say that because you watched it part of the time?
A. Watched it the biggest part of the time.
Q. Biggest part of the time?
A. Yes, sir.
Q. That is, you were up there at his house and stayed there all day each day, did you?
A. I didn't say so.
Q. How did you watch it?
A. By going up there occasionally.
Q. What do you mean by occasionally?
A. As often as I said before.
Q. How often did you say before that you went there?
A. Pretty often.
Q. What?
A. Pretty often, I said.

Q. Do you mean by that, that you went once a month?
A. I say oftener than that.
Q. Did you go there twice a month?
A. More than that.
Q. Three times?
A. Yes, more than that.
Q. Now, in the month of March, 1892, were you there three times?
A. Yes, sir.
Q. What times in the month?
A. I couldn't say. I ain't giving day and dates.
Q. Why didn't you mark the dates in your memorandum book, that you went there to see whether they were there or not?
226 A. I didn't have any occasion if there was no one there, to make any remarks about it.
Q. Were you there every week during that season of 1892?
A. Yes. sir.
Q. Never missed a week?
A. Well, I wouldn't say that. I might have missed a week.
Q. Might have missed several of them, didn't you?
A. Would say, no, I didn't.
Q. You didn't—will you say that you didn't miss a single week during that year?
A. A single week?
Q. Yes?
A. I will say so, yes.
Q. What time of the day would you go there?
A. Couldn't afford to carry a watch and keep the time of day.
Q. You can answer the question; you are paying for this.
A. All right. I answered it civilly. I say I didn't keep the time of day to give you—you want the minute.
Q. You understand ordinary English language, don't you?
A. Pretty near.
Q. About what time of day was it that you usually got there?
A. Daytime.
Q. That means anywhere from 5 o'clock in the morning till 7 o'clock in the evening, does it?
A. Yes, between 7 or 8; yes.
Q. Will you state one day that you went there between those hours?
A. Most all the time.
227 Q. Couldn't state a single day except what you got on your memorandum there, could you.
A. Not to a minute, no.
Q. I mean the day.
A. I said no, I was there often enough to watch the thing.
Q. How many times did you see either of them there in 1892?
A. That time I stated.
Q. One time?
A. Yes, 24th. They came out again the first of August.

Q. I thought you saw them there twice in August?
A. Yes. I said so, didn't I?
Q. Mr. Hill, if you will answer my question direct, and not talk so much it won't cost you near so much.
A. It is just as cheap for me.
Q. Who furnishes the money to prosecute this contest, to run this contest?
A. Mr. Hill, I say.
Q. Where did you get it, farming on this land?

Objected to.

A. Yes.
Q. Did you make that farming on this land?

Objected to, as immaterial. And motion to strike out or be taxed to the other side.
(Reading question.)

A. No, sir.
Q. Where did you get it?
A. Got it by a pension.
Q. How much pension do you get?
A. $25.00 a month.
228 Q. Most of it goes to the support of your family, doesn't it?
A. No, sir.
Q. Any of it?
A. Not a cent of this went.
Q. Any of it go for your whiskey bills?
A. No, sir.
Q. You have saved that for three years, have you, in bringing this contest?
A. No, sir.
Q. How long have you been saving it? For this contest?

Objected to as irrelevant.
Question withdrawn.

Q. Didn't you see Mr. and Mrs. Jacobus on that land in September, 1892?
A. No, sir, I didn't.
Q. Neither of them?
A. No, sir.
Q. Well, you won't say that neither of them was there during the month, will you?
A. I will, sir.
Q. And will you say that they were not there after the 11th of August, 1892, during the month of August?
A. No, sir, they were not.
Q. Were they there in October?
A. No, sir.

Q. Were they there in July?
A. No, sir.
Q. Or June?
A. No, sir.
Q. Now, you are just as positive of that as anything you have sworn to, are you?
A. Yes sir.

Mr. Ross: I ask to have the record read. I want the witness to understand the question.

229 Q. Do you know what month Iron River burnt up in 1892?
A. I wouldn't be positive. I think July.
Q. Don't you know Philip Jacobus was living on his homestead the day of the fire?
A. I know he was not. I know that he was not on the claim that day.
Q. What is that?
A. Philip Jacobus was not there.
Q. How do you know that?
A. I was in Iron River. I saw him.
Q. How do you know he was in Iron River?
A. I saw him in Iron River.
Q. You went there when you heard of the fire?
A. Yes.
Q. So did he?
A. No, he was not there.
Q. You say positively that he was not on his claim that day?
A. Yes, sir. I couldn't see him there; he told me he was there in Iron River.
Q. Say that he was not on the claim?
A. Why, yes; trying to save the stuff there in Iron River.
Q. Was he on the claim in May, 1892?
A. May, I think not.
Q. Well, do you know whether he was?
A. Yes.
Q. Do you know it?
A. I didn't see him there.
230 Q. That is your only reason for knowing?
A. I didn't see him there.
Q. And the same reason exists for your knowing that he was not there other days,—that you did not see him there?
A. Yes, I was watching and didn't find him there.
Q. Did you put in all your time, nearly, watching his place?
A. Biggest part of it.
Q. Stay there nights?
A. Home, yes.
Q. Not at Mr. Jacobus's? Did you stay at Mr. Jacobus's house nights?
A. No, sir, had no occasion to.

Q. You remained there mostly during the daytime?
A. Yes.
Q. Did you see him there in the month of April, 1893?
A. Nc, sir.
Q. Or in June?
A. No, sir. June, 1893?
Q. Yes?
A. No, sir.
Q. Will you say that he wasn't on the claim during either of those three months?
A. I claim he was not.
Q. You claim he was not?
A. I swear he was not.
Q. Was he there in July, 1893?
A. No, sir.
Q. Or August?
A. No.
Q. Was he there in September, 1893?
A. No, sir.
Q. Were you ever in Jacobus's house?
A. Yes, sir.
231 Q. Frequently?
A. No, sir, not very frequently.
Q. Were you ever there when they were living there?
A. No, sir.
Q. You made your entrance when they were not there, didn't you?
A. I was there when this man Wylie and Mr. Barrett.
Q. When was that?
A. That was the winter, I think, of 1893.
Q. In going from Iron River to Jacobus's house does he necessarily have to pass your door?
A. When he comes from Iron River, yes.
Q. Pass right by your door, does he?
A. Not past the door exactly.
Q. How far is the road from the house?
A. The way it goes now, right past the door.
Q. How was it in 1892?
A. What time of the year?
Q. Any time?
A. In the winter time he couldn't get past there, past my door.
Q. Did he have to go past your door in 1892 in the summer time?
A. No, sir.

By Mr. Ross:

Q. I will ask you whether you can remember the dates you were there on the land, or can remember the months you were there on the

land, positively, of your own memory, without the use of the memorandum book?

A. I can't.

232 Q. Then if you have testified on cross-examination that they were not on the land in June, 1892, is it possible that you might have been mistaken?

A. Yes, sir.

Q. Is your memorandum book correct?

A. Yes, it is correct.

Q. Would the same be true as to any other statement on cross-examination of some such dates where you were not permitted to use your memorandum book?

A. Yes.

Q. These are memoranda made at the time, are they?

A. At the time I saw them.

Mr. SMALLWOOD: We rest, subject to the privilege of introducing some documentary testimony we may want to.

Mr. WHARTON: The defendant moves to strike out the following parts of the affidavit of contest.

1. "On September 20th, 1892, Jacobus made final proof and commuted, and within a short time sold the timber and all of the land, and wholly abandoned the land, and has continued to abandon the land for a period of six months next prior to the date hereof." We desire to have struck out the statement therein that he has sold the timber and all the land, as there has been no evidence introduced on the part of the plaintiff to prove that fact.

2. I find the further statement in the affidavit of contest:

233 "Affiant has been credibly informed and verily believes W. E. McCord, who purchased the land and timber, deeded the land back to Jacobus in order that Jacobus might make supplemental proof required by the honorable Commissioner, and has offered to pay said Jacobus a salary if he would live on the land until the patent issued." I move to strike that portion of the affidavit of contest out, as there has been no evidence of any kind introduced by the contestant to sustain the allegations, or any part of it.

3. And the further statement in the affidavit of contest: "Jacobus went to Ashland on September 8th, 1893, as affiant is informed and believes, for the purpose of making supplemental proof required by the Commissioner's order, but affiant entered objection to such supplemental proof, and said Jacobus did not attempt to make the same." Ask to have that stricken out, because no proof has been introduced to sustain the allegation, and for the further reason that it is prejudicial to the defendant's rights.

The RECEIVER: I think inasmuch as some deeds here are attached to the affidavit of contest, that we will deny the motion as to that part, and grant it as to the other two paragraphs.

J. J. KENNY was called as witness, and being duly sworn testified as follows:

234 By Mr. WHARTON:

Q. Mr. Kenny, where do you reside?
A. Near Iron River.
Q. Are you acquainted with the land in controversy?
A. Yes, sir.
Q. You may state whether during the summer season of 1893 you done any work on the claim.
A. I did.
Q. What did you do?
A. I cut some hay there.
Q. Was that in the Jacobus clearing?
A. Yes, sir.
Q. How much of an area was there in grass at that time?
A. Well, there was nearly an acre, I think, three-quarters of an acre.
Q. What was the grass?
A. Clover and timothy.
Q. Mixed?
A. Yes.
Q. About how much hay did you cut on this land?
A. I should judge some over a ton.
Q. Well, would you say there was a ton and a quarter or ton and a half?

Objected to as leading.

A. No, I couldn't just exactly say. I didn't weigh it.
Q. You are entirely satisfied that there was a ton of it?
A. Yes, sir.
Q. Did you remove that hay from the land?
A. Yes, sir.
235 Q. Whom did you buy it from?
A. Mr. Jacobus.
Q. What time in the season did you cut that?
A. August; it must have been August.
Q. At that time was there any potatoes or other vegetables growing on that clearing anywhere.
A. I seen some.
Q. Which side of the house?
A. Some, I think there was, south of the house.
Q. How much of a space did you see in cultivation there?
A. I didn't pay much attention to the cultivation.
Q. Couldn't say how much there was, then?
A. I couldn't exactly say how much there was.
Q. Or how much land was cleared there at that time?
A. Oh, I should judge somewhere near two acres.
Q. Was there some growing timber standing on that, pine timber?

A. I think there was a few trees.
Q. Did you count them?
A. No, sir.
Q. At the time you cut that hay, was either Mr. or Mrs. Jacobus on the place?
A. When I was cutting the hay Mr. Jacobus came there, and when I was hauling it away Mrs. Jacobus and two other ladies were there.
Q. You left them there, did you?
A. Yes, sir.
Q. You don't know how long they remained?
A. No, sir.

No cross-examination.

236 JAMES H. DRUMMOND was called as a witness, and being duly sworn testified as follows:

By Mr. WHARTON:

Q. You reside at Iron River?
A. I do, yes.
Q. What position, if any, do you hold there?
A. Justice of the peace.
Q. Are you acquainted with the land in controversy?
A. Yes, sir.
Q. How long have you known it?
A. I have known it since 1888.
Q. Were you on the land at any time during the summer season of 1891?
A. Yes, sir.
Q. Frequently or otherwise?
A. I was there frequently.
Q. Did you find anybody living there?

Objected to as immaterial.

A. Yes, sir.

Objection overruled. Exception.

Q. How much of clearing was there there at that time, 1891?
A. Well, my impression is, there was an acre and a half or two acres there at that time. I didn't measure it. I couldn't tell anything about it.
Q. Then, coming up to 1892, were you on the claim frequently?
A. I was there a number of times in 1892; not quite as much as in 1891.
Q. In the summer season or winter season?
A. Both winter and summer season.

237 Q. Was there anybody living there at that time?
A. Yes, sir.
Q. Who?
A. Mr. Jacobus; and I saw his wife there.
Q. Saw her there most every time you were there in 1892?

Objected to as leading—putting the answer into the witness's mouth.

The RECEIVER: It looks as though it is leading.

Q. How often did you see Mrs. Jacobus there in 1892?
A. I wasn't there a great many times. I can't say exactly how much there was there; probably, I should think I must have seen her there 6 or 8 times probably during the season.
Q. Covering what portion of the year?
A. Perhaps more than that—covering from winter of 1892 until sometime about October 1892. Yes, the spring, sometime between March, I was there, or April,—sometime, I think, the latter part of the winter 1891–2. I stopped there, had my supper there one night. I think I was there another day and ate; sure I did. And then I was by there several times and saw her living there. But I didn't always go into the house.
Q. During that season was there any cultivation of land around that house?
A. Yes, sir.
Q. Could you state about what proportion, if any, was culti-
238 vated to garden vegetables, potatoes, and so forth?
A. Why, I couldn't swear exactly as to how much was cultivated. I wasn't thinking anything about it. I noticed there was potatoes growing there, and I noticed there was a crop growing there—has been every season since 1891; but I didn't pay any particular attention as to how much land was planted, or anything of the kind. I know there was hay growing there, and I have seen hay harvested there on the ground, and I seen that garden, potatoes and cucumbers; and there was flower beds there.
Q. Did you see the land in the summer season of 1893?
A. I saw the land in the summer season of 1893 but little. I was by there a few times.
Q. Do you know of any clearing being done there that season?
A. I couldn't be certain about that. I think there was some clearing done, or underbrushing, on the east side of the clearing.
Q. That would be east of the house, would it?
A. Yes.
Q. Did you see any crop growing there on the land in 1893, or did you pay any attention to that at all?
A. I didn't pay any particular attention to it. I know there was a grass crop grown and was harvested, and I think I saw potatoes there.
239 Q. Did you see either of the parties there, either Mr. or Mrs. Jacobus, in 1893, at any time?

A. I saw Mrs. Jacobus once, I remember, when I was going by. I didn't go to the house, but I saw her standing near the house.
Q. Could you state what month that was in?
A. I couldn't state what time that was. Don't remember.
Q. Did you ever count the trees on that clearing?
A. No, sir, I never did.

Cross-examination.

By Mr. SMALLWOOD:

Q. Mr. Drummond, give us as near as you can the different times you were on that land in the year 1892, commencing with the first?
A. I couldn't give any date of this. I couldn't give any dates at all, because I travel around considerably; and go by a place; but I don't remember any particular time in 1892 except two or three times I was by there. This day when I stopped, ate supper, that was sometime—there was snow on the ground. I know it was spring, very hard shoeing. I went on snowshoes. We were going across, looking up lines and running through timber in that neighborhood.
Q. What spring was that?
A. Spring of 1892 sometime. Snow was going off, still it was not getting bare ground or anything of that kind.
Q. Still snow on the ground?
A. Yes, I think it was in April.
240 Q. Think it was April? Well, were you there any other times in the early part of 1892? Were you there from January up till April prior to that time?
A. I don't remember any time. I might have been. I don't think of any time now.
Q. You were on snowshoes at that April visit, you say?
A. Yes, I was on snowshoes.
Q. Did you say there was someone with you?
A. Yes, Fred Brewer was with me at the time.
Q. That is the time you took supper there?
A. Yes, sir.
Q. Who was there at the house then?
A. Mrs. Jacobus was there, and there was some child there with her. I think it was Freddie Augusta, stopping there at the time. Saw him that day and saw him the next day.
Q. Do you know where Mr. Jacobus was then?

Objected to, as he has not been inquired of where Mr. Jacobus was at that time on direct examination.

A. I don't know where he was at that time.
Q. Did Mrs. Jacobus tell you where he was? Did you have a talk with her about where he was?

Objected to as calling for hearsay.
The RECEIVER: I don't think it is material what she said to Mr. Drummond about Mr. Jacobus.

241 Q. When was the next visit, Mr. Drummond, during that spring of 1892?

A. As near as I can remember, the next visit was probably a month after that.

Q. That would be in May. Who if any one did you see?

A. I couldn't say exactly. I remember that time particularly, but I couldn't remember any dates, anything definite, of course. I know I went by.

Q. That is near enough, I think. I am not a stickler for a definite time. Whom did you see there then?

A. I saw Mrs. Jacobus.

Q. Who else?

A. Several times in the summer. I wouldn't say that I saw her the next time. I can't remember. I don't know what the next time was. I don't know one visit from the other. Of course I was by there several times. I know that I saw her there quite a number of times. I can't say any dates.

Q. Do you think that during the whole of the year 1892 you were there at the place as many as six times?

A. Yes, I think I have seen her there as many as that.

Q. And two of these times must have been April or May?

A. I think so.

Q. Now, did you see her there in June, you think?

A. I can't say as to the other times.

Q. Did you see her there in July, 1892?

242 A. I can't say as to the dates. I don't remember the dates. I had no reason.

Q. Couldn't say whether you saw her there in August or September, could you?

A. No. I couldn't say any dates at all.

Q. Could you say positively whether you saw her there any more than two times?

A. Yes, I can.

Q. What was she doing at any of the other times?

A. I have seen her around the house, and I have been there and talked with her. She was at the house. I went by and stopped sometimes and talked.

Q. You were pretty well acquainted with Mr. and Mrs. Jacobus?

A. Yes, I have met them quite a number of times.

Q. On pretty good terms with them?

A. Yes, sir.

Q. What articles of household goods did they have there in the house?

Objected to, as not cross-examination. Overruled.

A. The house was furnished exceptionally well. They had the walls papered. Inside of the cabin was finished off inside neat, very neat and tastily; everything fixed up the way women will fix things up, and the bed and everything; the appearance of the place

there, good, homelike place all around,—exceptionally good for that country.

243 Q. That was in the spring of 1892?

A. Well, that was in 1892, yes.

Q. Were you in the house each time that you were there in 1892?

A. No, sir, I was not.

Q. Were you in the house at all during the summer of 1892?

A. I think I was, two or three times during the summer of 1892.

Q. Well, what months approximately?

A. I think I was there sometime in the summer months, June, July and August and September, along there.

—. ——.

A. I saw every time that I have been there—the house has been practically the same every time I have seen the house, been practically in the same condition that it was in 1892.

Q. What kind of a bed was in it?

A. It was a bed—I don't remember what kind of a frame the bed had. I know it was made up; looked nice and soft,—pillows and spread over it, and everything looked neat.

Q. Looked like there was a woman occupying it, and not like it was an old bachelor's quarters, did it?

A. It didn't look like an old bachelor's quarters, not by any means.

Q. They have any other furniture, Mr. Drummond?

A. Well, she—there was a stove, cookstove and cooking utensils, tinware and all those things, crockery, dishes and everything nice. I know when I had supper there the table was well spread.

244 Q. You were in the house—Did you say you were in the house in 1893?

A. No, sir, I was not, not in the house in 1893.

Q. You couldn't say, then, what was in the house in 1893, any time?

A. I couldn't say every time. One time when I was by, 1893, by the east side of the house, and looked in the window, and at that time the house was comfortably fixed up, and inhabitable.

Q. You would think, then, that from the time you have first mentioned, early in 1892, until—whole of the year 1893,—that they had the same articles of household goods in the house?

A. Well, I couldn't say. I don't know only as to these times I looked in. I don't know what was there at other times.

Q. How many times during the year 1892 did you visit them at Iron River?

A. I never visited them at Iron River in my life.

Q. You never was in the house at Iron River?

A. No, sir.

Q. You don't know that they were keeping house at all there, do you?

A. Well, not from my own personal knowledge, I don't know that they ever kept house there.

Q. What do you know about their being in Iron River?

245 Mr. WHARTON: He says he don't know anything about it from his own personal knowledge, and I object to any other kind.

A. All I know is hearsay, that is all.

Mr. WHARTON: We object to hearsay.

Q. You have never seen them in Iron River?

A. Yes, I have seen them in Iron River.

Q. How long since they moved to Iron River?

A. I don't know as they moved there. I have not heard that they moved there.

Q. Have you proved up your homestead?

A. Yes, sir.

Q. Didn't you move into Iron River?

A. No, sir.

Q. Doesn't the duties of your office call you there to town very often?

A. Not often enough so that—I don't do but very little in that line.

Q. I thought you had an office in Iron River?

A. I have an office there, but I am not in it but very little. When I have a case I am in it.

Q. About how often have you visited Iron River in 1892 and 1893?

Objected to as not cross-examination. Objection overruled.

A. I think my testimony was that from my own personal knowledge I had never visited their home in Iron River.

Q. How often did you say you were there during those two years, about?

246 A. In Iron River?

Q. Yes.

A. Oh, I have been there very frequently.

Q. Were you there as much as once a week, you think, Mr. Drummond?

A. I would average oftener than that. I got my mail pretty regularly. I have to.

Q. Now I will ask you whether at all these different trips you made to Iron River, whether you usually saw Mr. Jacobus there on most of those occasions?

A. I have seen Mr. Jacobus in Iron River most of the times that I have been in the village.

Q. Don't you know from your personal knowledge that during the time which you have testified about, '92 and '93, that he was engaged in business there?

A. Yes.

Q. He was carryiag on a barber business, wasn't he?
A. Yes.
Q. Was it furnished?
A. Yes.
Q. And he had help employed?
A. Part of the time; yes, most of the time.
Q. You have been there frequently to get shaved, haven't you?
A. Yes.
Q. Don't you usually go there to get shaved?
A. I go there nearly always to get shaved, yes.
Q. Would you go there as much as once a week for that purpose?
A. Well, I hardly think it would average as much as that.
247 Sometimes I would go twice a week, and sometimes once in two weeks. Depend on what I was doing.
Q. Who shaved you usually, Mr. Jacobus or his man?
A. His man shaved no more than himself.
Q. When his man shaved you, was it because he was away?
A. Yes.
Q. Jacobus was away?
A. Usually he shaved me when he was in there, but not always.
Q. When the man shaved you and Jacobus was away, do you know where he was?
A. No, sir, I don't know where he was at all times. Of course I know by common report.
Q. Do you know whether he was on this land?
A. I have known by report and by his telling me, and other people of his going out there,—that sort of thing.
Q. Isn't it a fact, Mr. Drummond, that during the whole of the year 1892 and 1898,—isn't it a fact within your personal knowledge that Jacobus resided most of the time at the town of Iron River, and that he went to the claim only on occasional visits; isn't that the fact?
A. No, sir, I wouldn't say that it was. I would say his home was where his wife is. I think his wife was on the land considerable of the time.
Q. This refers to 1892 and 1893 both, does it?
A. Yes.
248 Q. These times that you visited the land and saw Mrs. Jacobus there, it would be on your way to Iron River, wouldn't it?
A. No, not necessarily.
Q. Wouldn't most of these occasions be on your way to Iron River?
A. No, sir, my house doesn't lie in that direction. I wouldn't go by there going from my place to Iron River. I would only go by there if I was visiting some of my friends or on some business—surveying or something like that,—something that would take me out there.
Q. You have never seen her there, then, during the summer of 1892 and 1893, more than how often, did you say?

A. I couldn't say as to how many times I have seen her there. I couldn't say that I hadn't seen her there more than such a number of times, but I can't remember how many times I have seen her.

Q. Did you ever see her there more than three times?

A. Yes, I am positive that I have seen her there quite a number of times.

Q. Did you ever see her there more than four times in the two years?

A. I think so.

Q. Did you ever see her there more than five times?

A. Yes.

Q. More than 6 or 8 times; that is the extent of *of* your visits there? I think you have testified that.

A. I think I have testified I have seen her there as many
249 as that, and that is as near as I can come to it. I have made my statement as fair as I could.

Q. Don't you think that that would be the greatest number of times, 6 or 8, that you have seen her there?

A. No, I don't think so, but I don't want to state any more times than I feel absolutely certain I have seen her there.

Q. It is a matter of your recollection, of course. I am not asking you, Mr. Drummond, positively; but it is in view of asking you another question, and I want to know—there is some limit to this—you ought to be able to say whether you saw her there three times or 30 times. What do you say, Mr. Drummond, is the fact, as near as you can remember?

A. I don't see that that is a question; that is a statement that you make.

(Reading question:)

A. Yes, I think what I have told you is as near as I can come. I don't see how I can tell you any nearer.

Q. What have you told me?

Objected to.

A. I have told you that as near as I can remember that I must have seen her, Mrs. Jacobus, on the land at least 6 or 8 times in 1892, and that I saw her once in 1892 that I remember of.

Q. And you can't specify any particular times except April
250 and May, 1892, can you, in that year?

A. No, sir, I can't specify particular times. Of course I remember this trip on snowshoes; might have been March and might have been April.

Q. How, then, do you remember what particular times in 1893?

A. No, sir, I couldn't say.

PHILIP W. JACOBUS was called as a witness, and being duly sworn in his own behalf testified as follows:

By Mr. WHARTON:

Q. You are the principal defendant in this case?
A. Yes, sir.
Q. And you are acquainted with the land in controversy?
A. Yes, sir.
Q. Also with Mr. Hill, the contestant?
A. Yes, sir.
Q. You are the same party who made the homestead entry on the land in controversy, are you?
A. Yes, sir.
Q. Before securing that homestead entry did you have any contest with any party?
A. I did.
Q. Over that land?

Objected to as wholly immaterial.

A. I did.
Q. Who?
A. John F. Hill.

Mr. Smallwood objected to the question, for the reason stated above, and a general objection is here entered as to all ques-
251 tions touching the contest of Hill and Jacobus, which seems to have been adjudicated, and I ask that all testimony in reference to it be excluded from the record, and if admitted, be taxed to the defendant.

The RECEIVER: I think it is proper to show that there was an action.

Exception.

Q. That was the same John F. Hill who is the contestant in the present case, was it?
A. Yes, sir.
Q. On or about the 23rd of February, 1891, did you apply to enter this land?
A. I did.

Objected to as irrelevant.

Q. And when was your entry allowed thereon?
A. I think sometime in July, '91.
Q. '91, wasn't it?

Objected to as leading.

A. '92 yes.
Q. Before your entry was allowed on the land, did you establish a residence on it?
A. I did.

Q. When?
A. January 26th, 1891.

Objected to, unless it is shown that at the date of the entry there was the allegation which is required under the act of May 14th, 1880, wherein the settler alleges settlement 90 days prior to his filing and claims credit for it.
Objection overruled, and contestant excepted.

252 Q. In the spring of 1891, what did you do on the land in the way of improvements?

Same objection as above.

A. I had a house there.
Q. Well, describe the house?
A. It is a log house, 14 by 16 outside. I had a little porch on it, and had a planed board floor, two windows, painted inside, and a door.
Q. Did you during the summer season of 1891, or during that season, do any papering inside of that house?
A. I did.
Q. At what time?

Mr. SMALLWOOD: Before you proceed any further I would like to go on record: Counsel for contestant here objects to any testimony being introduced relative to the occupancy by the defendant or improvement by him of the premises involved prior to the date of his homestead entry, July 6th, 1892, for the reason that the only matters in issue, as indicated by the Commissioner's letter "H" of November 18th, 1893, are as follows: "Hill alleges in substance by affidavits that he is informed and believes that the entryman never settled upon said land in good faith to make it a home, but for the purpose of speculation; that he did not reside on the land during six months next preceding the making of his proof, but in-
253 stead lived at Iron River with his family, where he kept a barber shop, and that he has sold the land to one W. E. McCord." It is objected that any testimony shall be introduced as to anything outside of his settlement, prior to July 6th, 1892. We wish this to be a general objection, to save lumbering up the record.
Objection overruled. Exception.

A. I don't remember what time it was—during the summer sometime.
Q. What other improvements, if any, did you make on the land in the spring or summer of 1891 besides the house?
A. Done some clearing.
Q. How much clearing did you do that season?
A. I think we put in, cleared up pretty near half an acre.
Q. Did you plant that, raise any crop in the season of 1891?
A. We did.

Q. What was the nature of that crop, what did you plant?
A. Planted potatoes, onions, radishes, cucumbers, peas, corn.
Q. Any other vegetables? Did you plant any beans that year?
A. Yes.
Q. Did you cultivate the crop planted during that season?
A. I did.
Q. Harvest it?
A. Yes.
Q. Was that your residence and your home during the year 1891?

A. It was.

254 Q. What had you in the house in the way of furniture?

A. Table, stove, everything necessary to go with the stove, cooking outfit, dishes, china dishes, two rocking-chairs, cainseated chair, some wooden chairs, bedstead, springs, mattress, floor was carpeted all but a little around the stove, clothes press, wardrobe, rather china cupboard, dish cupboard, clock, bedclothes, looking-glass, comb and brush, and wearing apparel.

Q. Did you have an abundance of these things for the convenience of yourself and wife in keeping house?
A. Yes, sir.
Q. I believe you have no children?
A. No, sir.
Q. Yourself and your wife constitute the family up to this time?
A. Yes, sir.
Q. Now, during any part of the season of 1891 were you absent for any purpose?
A. Yes, sir.
Q. Where at?
A. I was at West Superior.
Q. What were you doing there?
A. I was working there barbering.
Q. Barbering is your trade, is it?
A. Yes, sir.
Q. Did you continue your residence on this land through the winter seasons of 1891–2?

Objected to as leading.

The RECEIVER: I think it is better to avoid the leading form.

255 Q. Where did you live through the winter of 1891–2?

A. I lived on the homestead, northwest quarter of 17, section 17, 48–8.

Q. And where did you live through the season of 1892 up to September?
A. Lived on the homestead.
Q. What improvements if any did you make after the summer season of 1891 and prior to the time you made your final proof. I believe that was in September, 1892?
A. I had nearly ¾ of an acre.

Q. Additional to what you had in 1891?
A. Yes, sir.
Q. And have you made any improvements since that?
A. I did.
Q. What improvements?
A. I had some underbrushing there.
Q. About how much?
A. Not quite half an acre underbrushed, and piled up, little trees chopped down.
Q. Is that immediately adjoining the clearing that you had there prior to that time?
A. Yes, sir, there is a fence, too.
Q. You say there is a fence around the clearing?
A. Between this and that I had cleared last in 1893.
Q. How much fencing, if any, have you done on the place during those years?
A. Well, there is nearly two acres enclosed.
Q. In the season of 1892, did you raise any crops there?
A. I did.
256 Q. What had you planted that year?
A. Had all kinds of vegetables, potatoes.
Q. On which side of the house, sides of the house, did you do your planting of vegetables in the year 1892?
A. Had a little west of the house—that is vegetables,—and we had some south of the house, and the potatoes was on the northwest and north, and also on the south and southeast of the house.
Q. Then is it true that you had your potatoes and other garden stuff planted almost around the house?
A. Nearly so, yes.
Q. How many potatoes did you raise in the year 1892?
A. I must have raised pretty near 10 bushel.
Q. Did you dispose of any of those potatoes to anybody?
A. I did, I sold six bushel to Mackmiller, T. E. Mackmiller in Iron River.
Q. What did you do with the balance of them?
A. We kept them.
Q. Do you remember the date that Iron River village burnt up in 1892?
A. Yes, sir, 24th day of July, I think.
Q. Where were you on that day?
A. I was out to the homestead.
Q. What part of the week was that?
A. That was on Sunday.
Q. Did you see Mr. Hill there that day?
A. I don't remember if I did or not.
257 Q. Were you absent from this land any portion of the season of 1892 before the 20th of September?
A. I was.
Q. Where were you when you were absent?

A. I was out working in Iron River.
Q. What were you doing there?
A. Barbering.
Q. During the year 1891 and 1892 what was your financial circumstances?
A. Bad.
Q. I will ask you to state whether, by reason of a contest over this land with John F. Hill, you had contracted any debts?

Objected to as leading. Let him state the circumstances. Objection overruled. Exception.

A. I did.
Q. During the year 1891 and 1892, was the land embraced in your homestead entry in a condition for you to make a living on it?
A. No, sir.
Q. Why, then, did you go away from the land to work?
A. To support myself and my family and to get money to meet my obligations.
Q. You may state whether or not, during the season of 1892, before September 20th, you had a residence in the village of Iron River.
A. I did not.
Q. Did your wife ever visit you during that period?
A. She did.
258 Q. Do you know how your wife was enabled to reach the land—how she got to it?
A. Sometimes she walked out, sometimes I sent her out with a team, sometimes I went with her myself with a team.
Q. Did you hear the testimony of Mr. Hill, wherein he stated that she always drove out with a two-horse buggy to the place?
A. I did.
Q. Was that statement true or false?
A. Well, it was a two seated buggy. It wasn't a buggy; it was a two seated spring wagon.
Q. Was that statement that he made true or false, that she always drove out with a two-seated buggy?
A. No, sir, it was not true.

Answer objected to, as not being responsive to the question, and a technical evasion of the fact at issue; whether it was a two-seated buggy or one seated buggy don't make any difference.

Q. Did she frequently walk out to the place?
A. She did
Q. What times were you on the place during the spring and summer season of 1892, if you can tell?
A. I was out there every week, every Sunday. I would go out every Sunday.

Q. Did you ever see Mr. Hill when you was going out to the place?
A. I did, a great many times.
Q. Frequently or otherwise?
A. A great many times.
259 Q. Where were all of these household effects that you have enumerated, during the entire season of 1892?
A. They were in our house.
Q. Do you mean your house on the homestead?
A. Yes, that is all the house I had.
Q. In the season of 1892 did you plant any crop, vegetables?
A. Planted potatoes.
Q. Potatoes are vegetables?
A. We sowed hay, planted hay.
Q. Was that sown in 1891 or 1892?
A. There was some sown in 1891 and some in 1892. As I cleared it seeded it.
Q. Up to the time you made your final proof, how much had you sown to grass?
A. I think there was about an acre, maybe a little more.
Q. What condition did you put the land in for sowing of the grass seeds?
A. We had it all cleared up nicely, raked over, and then raked it again, and sowed the seed and raked that over that way.
Q. Was the hay cut on that land in 1892?
A. It was.
Q. What was done with it?
A. Why it remained there. Mr. Ellerman came down and bought the hay of me the day of the fire—that we were out there. It was all cocked up nicely, and it rained so awful hard that night. We went in the day of the fire. And he had some horses.
260 Wanted to use the hay on the homestead; was going back up there. After the fire there, there was lots of work in Iron River, and he didn't come up for a time; and on account of it raining so heavy these few days it kind of spoiled the hay and he didn't come after it. And it remained laying there in the cock. That was in 1892.
Q. Did you increase your meadow ground any by sowing any seed in 1892?
A. Yes, sir.

Objected to as leading.

Q. You may state whether the crop planted in 1892 on your homestead was harvested.
A. It was.
Q. Where are the household effects that you had on this land in 1891-'92?
A. They are out in the house yet, now, unless they have been taken since last Sunday.

Q. You may state whether or not they have ever been removed from that house?

A. They have not, only when the house was swept out or something like that. They have never been taken out.

Q. Then at the time you made your final proof September 20th, 1892, how much of a clearing had you on the land?

A. Nearly two acres.

Q. Was there any timber left standing on that two acre lot?

A. There was.

Q. Have you ever looked over that timber or counted the
261 trees to see the number there was there?

A. I did.

Q. When?

A. Last Sunday.

Q. How many were there?

A. There is 42.

Q. State whether or not since 1892 any other timber has been cut off or removed from that clearing?

A. There has been some cut off, burnt up, yes.

Q. About how many trees would there be, was there on the claim then—clearing—at the time you made your final proof in 1892?

A. Well, it was this same amount upon this two acre tract.

Q. Well, now, do I understand you that there are the same number of trees on that clearing now that there were when you submitted your proof in September?

A. Upon the two acres of land, yes.

Q. What kind of timber is that?

A. It is pine timber. It is located on the west line of the clearing, all of it.

Q. Are those trees of any value for any purpose whatever?

A. They are.

Q. For what?

A. For timber.

Q. Have they interfered in any way with the growing of crops there?

A. They have not, for the reason they are on the west side, near the line. Sun can come around from the east; that is all clear, and
in the south; the crop grew very nicely, and on the east
262 side it is kind of alders. It is not large pine standing there;
it lets the sun come down,—not very high.

Q. What kind of a fence did you make there?

A. Two-rail fence.

Q. How is it constructed?

A. Piece cut off and set down and stakes driven in crossways, and one rail lays on stump, lower rail, and the cross piece comes in crossways and the other lays up on top of that.

Q. About how high does it make your fence?

A. About so high (indicating).

Q. You better state.

A. Between two and three feet. I think pretty near three feet Hard work for a man to get over it unless he climbs up.

Q. There is a road, is there not, passing near your place, running north?

A. It is on the west line.

Q. How far is that from your house?

A. I should think it would be about 5 or 6 rods. I should think about that.

Q. At the time you submitted your final proof September, 1892, state whether or not you obtained your final duplicate receipt from the receiver?

A. I did.

Objected to as immaterial.

Q. You may state whether or not up to that time you had acted in entire good faith in making a home upon that land.

263 Objected to as leading.

A. I did.

Q. Did you continue your residence, after making final proof, on the homestead between that and the date of your supplemental proof, which I believe was the 12th of September, 1893? Where was your residence?

A. I was on the homestead.

Q. Had you during any of that period a residence elsewhere?

A. No, sir.

Q. Did you, prior to making supplemental proof on that land, dispose of it to anybody?

A. I did.

Q. To whom?

A. McCord & McLeod.

Q. When?

A. I think the 27th or 29th of December.

Q. What year?

A. '92.

Q. You may state whether or not prior to that date—state whether McCord and McLeod had any interest in that land?

A. They did not.

Q. When, with relation to the date of that sale, did you receive the notice that the Commissioner had held that the proof was prematurely made, and that you would have to submit supplemental proof?

A. I don't remember when that was,—May or June or July, sometime around there.

Q. What year?

A. '93.

264 Q. Then it must have been after you had made the sale?

A. It was.

Q. Was your wife living continuously on this land from the time you made your final proof up until the time you made your sale?

Objected to as leading.

A. She was.

Q. After that time, and before you made supplemental proof, where did she live?

A. She lived on the claim most of the time.

Q. Well, did she live there all the time?

A. Only while she was sick, for a little while in Iron River, and she was visiting in Chippewa Falls.

Q. When did you learn that in the class of cases like yours the Commissioner was holding that the proofs had been prematurely made, and supplemental proof would have to be made.

Objected to as immaterial.

A. I heard some talk about what had to be done in January.

Q. '93, do you mean by that?

A. I heard that.

Q. Do you mean you heard it in January?

A. Yes, that we all had to make supplemental proof; but was not so notified by the Government.

Q. Was that before or after you had made the sale?

A. That was after I made the sale. The next month.

265 Q. You may state now whether in the crop season of 1893 you planted any crop upon this homestead?

A. I did.

Q. What did you plant that year?

A. I planted potatoes and vegetables of all kinds.

Q. How much of an area did you plant to vegetables and potatoes?

A. Oh, I should think we had half an acre, potatoes and everything.

Q. Was that crop cultivated?

A. Most of it. Some of it was taken before I had a chance to get at it—potatoes especially.

Q. By what?

A. By somebody. I don't know.

Q. Do you mean by that, that they were stolen and taken out of the ground,—stolen?

A. Yes, sir. One of our neighbors wanted to buy it from me, and I told him I couldn't sell them, and when I went to get them the next time they were gone—last part of September or October.

Q. Did you harvest any portion of the crop that year, vegetables?

A. We did, yes. All the vegetables that we had there.

Q. What did you do with the meadow in the year 1893?

A. I sold the hay to Mr. Kenny.

Q. The witness who testified yesterday?

A. Yes, sir.

Q. What time in the year 1893 did you do that underbrushing?
A. In August, last part of August.
Q. Were you absent from the land any time during the season of 1893?
A. I was.
266 Q. Where were you when you were absent?
A. I was in Iron River.
Q. Did you hold any position there, any official position?
A. I did.
Q. What was it?
A. Treasurer.
Q. Of what?
A. Town of Iron River.
Q. Does that mean the village of Iron River or the political township of Iron River?
A. It takes in the village of Iron River,—there is 5 towns in the village.
Q. Five towns constitute——
A. Five and a half or six constitute the village of Iron River.
Q. You was treasurer over that territory?
A. Yes, sir.
Q. Did that include the land in controversy?
A. Yes, sir.
Q. When did you qualify as treasurer?
A. Sometime in April.
Q. And when did you enter upon the duties of the office?
A. Also in April,—21st of April.
Q. You may state whether as treasurer of Iron River township, from the time you entered upon the duties of that office you had your office in Iron River for the collection of taxes?
A. I did, in December, 1893.
Q. You don't listen to my question very well?
(Reading of question.)
A. I had no office. I had it in the barber shop.
267 Q. What I am trying to ascertain, Mr. Jacobus, is whether you had an office in which you discharged the duties as treasurer of that township, from the time you qualified up to this time?
A. Well, I had it in the barber shop.
Q. From the time you qualified?
A. I did my business as treasurer,—I did it in the barber shop.
Q. Well, from the time you qualified in April, 1893, had your office in the barber shop in Iron River village, as treasurer?
A. Yes, sir.
Q. Were you in your office any portion of the time between the 19th of December and the 7th day of January, 1894, in the discharge of your duties as treasurer, collecting taxes?
A. 1893–4, I was there all the time.

Q. How far from the land in controversy?
A. About six miles.
Q. What were those improvements on the land worth when you made final proof?
A. I presume they were worth between two and three hundred dollars.
Q. Were they worth any more at the time you made supplemental proof?
A. Yes, for the reason I had more clearing done.
Q. How much more were they worth then?
A. I should judge $25.
Q. About what proportion of the time were you away from the land in 1892 before you made final proof?
A. Oh, I suppose nearly part of the time.
268 Q. Bigger part of the time?
A. No, about part—about half, I should say.
Q. Did you make any arrangements with Mr. McCord and McLeod for a reconveyance of the land in this case, so that you might make supplemental proof?
A. I didn't.
Q. Who did make that, if anybody, for you?
A. My attorney, Mr. Wharton.
Q. You may state whether or not you did receive a quit-claim deed from them for the land before making supplemental proof?
A. I did.
Q. And executed to them a mortgage?
A. Yes, sir.
Q. What was that mortgage given for?
A. For reconveyance of the land.
Q. Well, the quit-claim deed from McCord and McLeod to you would be the reconveyance of the land.
A. Well, that is for protection to them.
Q. For security for the purchase money?
A. Yes, sir.
Q. Has that mortgage ever been cancelled, to your knowledge?
A. It has not.
Q. Have you been in position since making that supplemental proof to pay off that indebtedness?
A. No, sir.
Q. When working in Iron River in the barber shop during the year 1892 and the year 1893, before you made supplemental
269 proof, did you have anybody employed in the office with you at any time?
A. I did.
Q. Who?
A. Samuel Marlette.

Cross-examination.

By Mr. SMALLWOOD:

Q. You speak of a clearing in 1891 of about half an acre,—who made that clearing, Mr. Jacobus?

A. I had some men to work for me, and also helped myself.

Q. What part of it did you do?

A. Individually?

Q. Yes?

A. Oh, I worked there with them,—helped.

Q. How many days?

A. Oh, I worked, I suppose, pretty near three weeks there that time.

Q. Who were the men that helped you?

A. I didn't know who they were,—strangers, I met them at Iron River.

Q. How long did you have them employed?

A. I think it was nine days.

Q. For how much?

A. I gave them a dollar and a half a day and board.

Q. You can't say what proportion of the work you did yourself, can you?

A. I worked with them; no, sir.

Q. What area did you have in garden that year, 1891; how much, how many rods square?

A. Well, we put in mostly all into garden and grass seed. You mean just for vegetables; we had, must have had between 5
270 and 8 rods, I think, square, in vegetables, potatoes and stuff,—might not have been quite that much.

Q. You said you had all necessary furniture, enumerating the articles. Can't you tell us exactly what were those articles. Can't you by your recollection give us an invoice, from memory, of what you had in your house? I ask you this simply because you said you had the same things in the house. You may describe the furniture?

A. Describe what we had in the house there?

Q. Yes?

A. Well, as near as I can remember, 2 rocking chairs there, cane seated chair, some common chairs like these here, a bench and table, large four-cornered table, then another table, small table, folding bed, a bedstead, mattress, springs and bed clothes, looking-glass, clock, wardrobe in the corner, dishes, closet for dishes—made up this way and then out this way, for dishes (indicating)—and stove, all cooking outfit that goes with stove, water pail, washdish, carpet, another little cupboard, pans, clothes, wearing apparel.

Q. Do you know what was about the value of the household goods and kitchen furniture, kitchen utensils there during all the time you were out there?

A. I don't know as I could say.

Q. Just approximately, give us your recollection of what they cost?

271 A. I don't know as I can do it. I don't know as I got hardly anything that is in the house. My wife generally buys everything.

Q. You can't tell?

A. No, sir.

Q. You had plenty, anyhow, for the necessities of housekeeping?

A. Yes, sir; also had another bed, another one of these here folding spring, that we put under our bed.

Q. That is the year that you were at West Superior barbering, 1891, that you had all of this, is it?

A. Yes, sir.

Q. And you had the same, as I understand you, each year about substantially the same—now you speak of some crop harvested in 1891; tell us what it was, as near as you can?

A. It was potatoes and vegetables. We had quite a crop of vegetables, for the reason, had some friends living in Superior, I was used to take along to them when I would go back.

Q. What kind of vegetables?

A. I would take in beans and cucumbers. I took in some onions. I had an awful crop that year—cucumbers.

Q. Some potatoes also?

A. Yes, I took potatoes; took about potatoes that large (indicating).

Q. Did you sell or dispose of some potatoes?

A. Not that year, no, sir.

Q. What did you do with the potatoes you raised, then?

A. We ate them.

272 Q. Do you know how many bushels you raised?

A. No, I don't remember how many bushels we raised that year. Of course we kept eating out of them, as they were smaller, and gave them away to some friends.

Q. Could you give us an estimate of what you raised that year?

A. We might have raised four or five bushels.

Q. And about the beans,—you had a large crop. How many do you think there was, that large crop?

A. I don't know. We had about as large as this room here, easily, full of beans.

Q. Were these vegetables all raised that year in one spot of ground?

A. No, sir.

Q. Or in different places?

A. Yes, some on the west side of the house and some on the south side of the house.

Q. How much in all, as to area, would you say there was in that garden that year?

Objected to as having been asked and answered once on cross-examination.

A. Between 5 and 6 rods, I should say, square.
Q. Square?
A. Nearly so.
Q. Do you mean five or six rods square or 5 or 6 square rods?
A. That is the same thing, ain't it?
Q. In 1892, what was the amount of your crop in that garden,—take the principal items?
273 A. Well, we had the same as before, only we had many more potatoes and more grass.
Q. How many potatoes did you raise?
A. We must have raised pretty near 10 bushel. I sold 6 bushel to T. F. Mackmiller—man in Iron River.
Q. Is he here as one of your witnesses?
A. He is not, no. I didn't think of him or I would have had him here.
Q. How much did he pay you?
A. 55 cents a bushel.
Q. Did you sell them for cash, or get it in trade?
A. I don't remember. I guess I got the cash for them.
Q. Do you know about what time of the year you sold those?
A. No, I don't. It was in the fall of the year, just before it got cold. I had them dug just before it got cold.
Q. How did you get those potatoes into town?
A. With a team.
Q. Did you sell them in the ground?
A. No, sir.
Q. Or did you hire a man to dig them?
A. I hired a man to dig them, or my wife did.
Q. Same thing?
A. Yes.
Q. Then did you have to hire a team to haul them to town?
A. Yes.
Q. And you got only about $3.50—three dollars and how much for them,—$3 and something?
A. $3.50.
274 Q. Wasn't much profit in that farming, was there?
A. No, but then I wanted them in. I think I brought some goods out with the team, and brought them in.
Q. Now, what did you do with the balance of the crop?
A. We kept them in the house.
Q. In the house?
A. Yes, sir.
Q. And ate them, did you?
A. Ate most of them. Some of them spoiled.
Q. Some of them spoiled? What did you do with the hay crop that year?
A. 1892?
Q. Yes?
A. That is the hay that I spoke of before, I think.

Q. It was spoiled after being harvested?
A. Yes, got spoiled.
Q. What did you do with that hay crop of 1893?
A. I sold that to Mr. Kenney.
Q. Didn't you say also that you had sold the hay crop of 1893?
A. I had sold that, but the man didn't get it; didn't come up after it on account of its raining so heavy and spoiling it.
Q. Did you get pay for the hay crop of 1893?
A. Yes, sir.
Q. How much?
A. $3.00.
Q. What time did you leave your barber shop in West Superior to change your place of carrying on your trade, Mr. Jacobus?
A. Well, I wasn't running barber shop when I came from West Superior here.
275 Q. I understood you, when you made your settlement your first work at your trade was there at Superior?
A. Yes, but I was not running any barber shop there.
Q. What time did you quit barbering in Superior to start up the same business for yourself here at Iron River?
A. I quit in 1892, April,—last part of April, 1892.
Q. That was prior to your homestead entry?
A. Yes, prior to the time I got my filing.
Q. You applied for it before?
A. Yes, sir.
Q. About the hay crops of 1892 and 1893,—compare them and say what was the difference in the crops of those two years.
A. Well, there was quite a little difference.
Q. Which was larger?
A. 1893.
Q. How much more was there of the crop of 1893 than of 1892?
A. Well, there was quite a little, for the reason that this grass came up that was sown in 1892, the second time that came up so much larger.
Q. Was there twice as much, you say?
A. I think there was.
Q. There was half as much again—that would be 50 per cent. more, was there?
A. I think there was again as much there.
Q. On the day of the fire in Iron River village, July 24th or '5th, 1892, where was you when you first heard of the fire?
276 A. When I first heard of the fire I was on my way going from my claim.
Q. From the claim?
A. Yes.
Q. Who told you about it?
A. Mrs. Elleman. That is the lady that was out with her husband, out to our house, on the day of the fire. Was visiting us out on the claim.

Q. Had you started to Iron River on some business before you heard of it, and met her on the way?
A. Yes,—no I met her at her house.
Q. Between your house and Iron River, at least?
A. Yes.
Q. Then what did you do,—come on into town?
A. Yes. Came in and sent a man out to tell my wife.
Q. Your wife was out on the homestead?
A. Yes, they were there visiting her that day at the time of the fire. That is the time I sold him the hay that he didn't take.
Q. How long had you been there at that time, Mr. Jacobus, at the time of the fire?
A. I had went out on Sunday.
Q. What day of the week did the fire occur on?
A. On Sunday.
Q. You had been there a week?
A. No, sir, I went out the day of the fire.
Q. Day of the fire?
A. Yes, sir.
A. Well, why did you send word to Mrs. Jacobus the day
277 of the fire in Iron River?
A. To let her know everything was taken.
Q. You had a barber shop then, did you?
A. I did.
Q. What did you lose in that fire?
A. Oh, I lost bed clothes there. I had a bed in the back room in the shop, and some tools and some clothes.
Q. The value of it wasn't much, was it? Of all you lost there?
A. Oh, it was quite a little.
Q. Did you have any insurance on it?
A. I didn't.
Q. Well, how much did you lose?
A. I must have lost a couple of hundred dollars' worth of stuff.
Q. Now, after the fire, how long before you went back on the homestead?
A. I think it was the next Sunday.
Q. Was Mrs. Jacobus with you then?
A. No, sir, she was out there.
Q. She was already out,—she had gone in advance of you?
—. ——.
Q. She didn't come in then, when you sent her word about the fire?
A. No, sir.
Q. She remained there?
A. Yes, sir.
Q. Then how long did you stay after you went back there?
A. I stayed three or four days.
278 Q. When you returned, your wife came back in with you then, didn't she?

A. No, sir, she stayed there.

Q. Was there anyone with her, helping her about her housekeeping matters or doing chores for her?

A. Had a little boy, our neighbor's boy.

Q. How old is that child?

A. About 6 or 7 years old, or 8. Between 6 and 8.

Q. He couldn't do much in the way of errands for her?

A. No.

Q. How did she get wood to do her cooking with?

A. I had wood out.

Q. Have to hire somebody to do that?

A. I did.

Q. How much would you have out at a time?

A. Oh, I would have piled maybe a cord.

Q. How much?

A. Sometimes a cord, sometimes more, sometimes less.

Q. Who did you hire to cut the wood at any particular time?

A. Oh, I had different ones. Fellow named Porter cut wood, a neighbor out there, and a fellow named Barry—he must have cut pretty near two cords there at one time.

Q. Did you have a well on the premises there, or how did you get water for domestic purposes?

A. Got some from the spring, and some from I don't know what you call it,—kind of run in that way; kind of surface water, that we used for washing dishes and such as that, and drinking water we get from the spring.

279 Q. And when you would go out there how much provisions would you take, provisions to last how long?

A. I would always take provisions to last two months or three months.

Q. Generally take them with a team?

A. Part of the time I would get a one-seated or two-seated team, two-seated rig, and take it full of groceries.

Q. That was the object in having that?

A. Well, mostly.

Q. Have something to haul your supplies out?

A. Yes; and besides that, I would always carry a great many things, like meats and such as that. I would take in fresh meat.

Q. During the times that you were there in 1892 and 1893 do you remember any particular times when any of your neighbors visited there at your house?

A. '92, I can remember quite a few. '93 I can.

Q. '93 you can't?

A. No.

Q. '92 you can?

A. Yes, sir.

Q. Who was there, at any particular times, visited you when you were there?

A. Mr. Lowe there. Mr. Smith. I met Mr. Hill's boy there often. Lenny Hill, he came over there often, often met him. I often saw Mr. Hill. I never go and talked with him, though, as he passed along, because I didn't want to.

280 Q. Did Mr. Lee ever do any work for you on the place?

A. Mr. Lee?

Q. Yes?

A. I don't remember whether he did or not.

Q. You can't remember whether you hired him or paid him to do any work there?

A. No, my wife she done that all.

Q. How?

A. My wife always did that.

Q. Do you know whether she hired him or not?

A. I don't.

Q. Well, as to the work that was done and the men that were employed, was that left particularly to Mrs. Jacobus to arrange?

A. No, for the clearing, for the first time I hired them, two men, and two men second time. I had twice two men working there.

Q. But as to any other matters necessary to her own convenience?

A. In gardening, and so, she done that.

Q. Now, Mr. Jacobus, will you tell us how often and when during the year 1892 you went out on that land? Commence from the first of the year 1892 now, and we will go right through?

A. Well, sir, I went there nearly every Sunday.

Q. Nearly every Sunday?

A. Yes, and usually stayed until Tuesday or Wednesday.

Q. You say nearly—can't you give us more approximately the time when you would go?

A. Would go pretty near every Sunday. Of course I was so

281 close to it, and that is the only time I could see her, two or three days of the week I would go out.

Q. Were you there in January, 1892?

A. January, 1892?

Q. On any of the Sundays or any other day?

A. I was there, but my wife wasn't.

Q. You can't say what day of the month or week in January you were out there, can you?

A. I can't for the reason that we didn't think we were going to have any trouble and didn't think about anybody living there.

Q. How about the month of February,—can you recall any particular Sundays or other days of the month or week when you were out there?

A. In the middle of February I was out there from that on. I think I went out there every Sunday. I am almost certain I was.

Q. You were out there every Sunday in February?

A. Yes.

Q. And in March?

A. Yes, sir.

Q. And in April?
A. Yes, sir.
Q. And in May?
A. Yes, sir.
Q. June?
A. Yes, 1892.
Q. '92; now we are right in 1892?
A. No. I wasn't out every Sunday in January and February. Of course I was working in Superior at that time.
Q. How about March and April, and all the spring months?
A. Well, I was out quite often in those months. Maybe
282 twice a month I went out there. That is the way I used to go out, twice a month—sometimes every week, even, from Superior.
Q. Mrs. Jacobus living there all of this time when you were away?
A. Yes, sir, she was always there.
Q. She was not out, did you say, in January?
A. She was visiting in January,— that is why as I say I was not out there when she was not there in January.
Q. In June how many times were you there?
A. I was there every Sunday.
Q. How long did you stay the first Sunday in June?
A. First Sunday I didn't stay but one day.
Q. Second Sunday, can you recollect about how long you stayed?
A. No, I tell you why I recollect this particular time. It was because I came in on Monday morning, and I got a dispatch while I was out that my mother was dead.
Q. That is the reason you remember the early part of June,— that circumstance?
A. That is the reason I remember that.
Q. No other circumstances at all to enable you to recollect the second and third weeks in June, is there?
A. No.
Q. Nor the last week?
A. No.
283 Q. But you are sure you went out there about every Sunday?
A. Nearly so, yes. Then July, I had a horse there, and I would ride it. Went out every Sunday.
Q. How was it, now, in July, as compared with June?
A. July the same thing.
Q. About the same?
A. Yes.
Q. And also——
A. All through August, that was my business to see her.
Q. Taken all through the year 1892 up until you proved up in September?
A. Yes, up until September.

Q. December?
A. Yes, after I proved up, even.
Q. December, that was the time it was sold, wasn't it?
A. Dec. 27th, yes.
Q. And you believed, of course, that your proof was sufficient and complete then?
A. I supposed so, yes.
Q. And you didn't feel, of course, that you were under the same obligations to go on it so often and to pay such attention to it as before, did you?
A. Not at that time.
Q. That would be natural for a man who thought he had made proof?
—. ——.
Q. Now, about that sale, Mr. Jacobus: what was the consideration of the sale, that is, the actual *bona fide* money that it was sold for?
A. $4300.00.
284 Q. How much of the consideration was paid in cash?
A. It was all paid in cash—that is, partly,—and then just the same thing as cash; we got note, and had it cashed, of course.
Q. It was cash or its equivalent?
A. Yes, sir.
Q. How long after it was conveyed by you,—it was conveyed then, wasn't it, at that time?
A. Yes, sir.
Q. How long after it was conveyed before it was conveyed back to you or quit-claimed to you, do you remember?
A. I don't remember what time it was quit-claimed back to me.
Q. But when it was quit-claimed back, what was the consideration or trade then? Was it a *bona fide* one, or was it simply quit-claimed back for the purpose of enabling you to make this proof?
A. Yes.
Q. That is all, wasn't it, to enable you to acquire title to it?
A. Yes.
Q. Then the mortgage you have was simply to secure the men who had advanced you this money?
A. Yes, sir.
Q. How, in 1893, when did you first--I don't know but you stated on direct, but I want to ask, when did you first get notice that your proof was not accepted by the department, and that you would have to make further proof?
A. I didn't get that notice until either May or July, I don't know exactly.
285 Q. 1893?
A. Yes, that I got this from the land office here that I would have to make supplemental proof.
Q. Now, tell us what you did; when you got that notice what did you do?

A. We didn't do any different from what we did. I heard in January that we had to make supplemental proof; it was rumored, but I hadn't been notified to that effect.

Q. You had no official notice?

A. No, sir. My wife was away then for awhile.

Q. After the fire?

A. No, this was in 1893—down at Chippewa,—then she came back, I told her then what we got to do, and so we went out on the claim again.

Q. What time was that, in February?

A. That was in February, and she got sick with rheumatism and I had to bring her into town. I had her there for four or five weeks. I had three doctors, and one doctor with a battery, an electric battery. Then she went out again, I think, in March or April, I don't remember. Then she stayed there almost continuously, only when she came into town, from that time until I made my supplemental proof.

Q. That is in 1893?

A. '93, yes.

Q. You can't say how often she came into town?

A. No, I can't. It was not very often.

286 Q. Was there no one with her then to assist her with her household duties out there, to do her work for her?

A. Sometimes there was and sometimes there was not.

Q. Now, how much, then, were you out there during the summer of 1893?

A. I wasn't out very much.

Q. Did you ever say to anyone after you had notice of requiring supplemental proof that you didn't intend to make it, that you didn't care a cent, or words to that effect; that you had sold the land and that you didn't propose to make that?

Objected to, unless the time, place and person to whom he said it is fixed, and as wholly immaterial and not cross-examination if it is not for the purpose of impeachment.

Q. I am giving you a chance to say whether or not you said anything of the kind. If you didn't that ends it. If he didn't I think he is entitled to say so.

A. I didn't.

Q. You never said that?

A. I didn't.

Objected to, for the same reason, if asked for any purpose except laying foundation for impeachment.

Q. You felt, then, after you had sold the land, that you were under obligations to make good the title to the man who had paid you the money, didn't you?

A. Yes, any honorable man would done such a thing.

287 Q. The reason of your absence from there after proo and before supplemental proof was because you felt that you had complied with the law already, wasn't it?

A. Yes.

Q. Now, there is one other question, I believe, and that is about the value of this land. You were the township treasurer there, and you know the assessment of the different property,—what was this property, this land in question, assessed at in the year 1892, and also in the year 1893, as appears by your books?

Objected to, for the reason that under the holding of the Commissioner before final receipt has issued the property is not taxable under the law.

M. SMALLWOOD: He can say it was not assessed at all, then.

Q. Was it assessed during either of those years?

A. It was for 1893.

Q. Not in 1892?

A. No, it wasn't. It was assessed in 1893. Of course the assessment for one year would be for taxes due at the beginning of the next year. I suppose it was assessed for '93, assessed last May.

Q. But not assessed in 1893?

A. No, sir.

Q. Well, what was the assessment?

A. I could't possibly tell you what the valuation was.

288 Q. Could you tell me approximately by your recollection of your records,—couldn't you tell me very near?

Objected to, as the record is the best evidence.

A. Each forty is valued separately, and it is kind of hard to tell that. I just looked at it one time, and that is all. I think it is. It must have been assessed between two and three thousand dollars as fixed by the assessor.

Q. You counted the trees in this clearing last Sunday?

A. I did.

Q. How many of them had been cut down since you made your supplemental proof, and how many since you made your first original proof?

A. Well, there was no large trees cut down in this intervening time between the final and supplemental proof.

Q. All the large trees were standing, were they?

A. Still standing yes.

Q. And you don't know how many smaller ones were cut down?

A. I don't.

Q. And now there are, you say, 42 trees?

A. 42 trees I counted last Sunday.

Q. Were those small trees, or good size?

A. They were pretty good sized trees.

Q. About what is the average size?

A. Average. Oh, I should think it would be about 14, 16 to 18 inches through. That is the big—take with the small, average them up.

289 Q. There wouldn't any of them be bigger than 18 inches, you think?

A. There probably is, yes, and there is others again smaller. I am trying to average them.

Q. You spoke of your residence on the land. Give us your definition of word "residence."

Objected to as immaterial.

Q. Residence is used in the proof, and is used here, is a kind of a technical term, and in order to understand your testimony we would like to know what you mean by residence, what constitutes a residence?

A. I believe that that was my home. My family lived there, and I lived there with her as much as I could, when I wasn't away earning a living for us. We had no other home.

Q. Didn't have any home anywhere else?

A. No, sir.

Q. You never owned any household goods anywhere else than what was on the farm?

A. Except what I had in my room there where I would sleep.

Q. In Iron River?

A. Yes, sir.

Q. What household goods did you have there?

A. I had a bed, bedstead and a little table.

Q. You refer, of course, to 1892?

A. Yes, sir.

Q. You don't mean to say that in 1893 you wasn't housekeeping there?

A. In 1893?

Q. Yes?

A. I do.

Q. That you were not housekeeping in Iron River?

290 A. I was not housekeeping, what you call housekeeping.

Q. You never had a house in which you and your wife cooked and ate and slept in Iron River at all since you took this claim, did you?

A. Not until after, no sir.

Q. Until after when?

A. Until after I made my supplemental proof.

Q. Till September 12th, 1893?

A. It was later than that. Up to that time my wife was on the claim.

Q. How did you and your wife live, then, when you were at Iron River, when she was with you?

A. Boarded at the hotel, at the Seymour house.

Q. What place?

A. Seymour house. I first boarded before she came in at the Augusta house. When that burned down I went to the Seymour house, after we took our meals at the Seymour house.

Q. Do you know what day you went to housekeeping?

A. I don't. I think it was in October sometime.

Q. '93?

A. '93.

Q. You swear positively that you never had any articles of household goods prior to October, 1893, in the village of Iron River excepting the bedding, and so on, where you and your wife
291 lodged, back—I guess in the same building, barber shop, wasn't it?

A. That we lodged, yes.

Q. No household goods?

A. Not while we lodged there, no, sir.

Q. Except what you had there, including the bed and her wearing apparel?

A. Yes.

Q. Is that all?

A. Yes.

Q. Did you have any trunks?

A. Yes.

Q. They contained only wearing apparel?

A. Yes.

Q. You spoke of the time that your wife was away visiting at Chippewa Falls,—was this prior to the burning of Iron River village?

A. It was once. She went at that time, and went again in 1893. That is the time she always goes to Chippewa, in the winter time, them months.

Q. Did she go immediately after the burning or not?

A. No, sir, she stayed out on the homestead.

Q. How long after the burning happened before she went to Chippewa?

A. About 6 months after.

Q. That was when?

A. In July, and this was in December or January 1; don't know which.

Q. How long, each of these times Mrs. Jacobus was away in the fall, did she stay; how long did she make these visits?

A. Two or three weeks.

Q. Why was it that after you made proof on your land, and you believed your proof to be good, and you had sold the land,
292 that you still continued to say your residence was on it.

A. For the reason, as I stated, that I had sold this land, and if there was such a thing as that I wasn't going to let the man that bought it from me be looser by it. I was going to make him all right. It wouldn't be much longer, anyway, only 5 or 6 months, and we might do it and we wouldn't lose anything by it. We had

nothing to lose, and he had used us well, so that I thought we ought to do it. That was the reason, and the only reason.

Q. Didn't you believe that your proof was sufficient?

A. I did, but having heard that this was necessary, thought that we would go back on and not give anybody a chance to make any trouble any more.

Q. But you say you didn't hear this until January 1893?

A. Well, then, I already heard in December, it wasn't only a couple of weeks or so afterwards, December, 1892, very shortly afterwards, just within two weeks or so.

Q. As soon as you heard that there was some doubt of this, although you had your final receipt, did you resume your residence there?

A. My wife was visiting in the meantime when I heard this. When she came back she went right out again.

Q. You said that in 1893, Mr. Jacobus, some of your crop was stolen, didn't you?

A. Yes, sir.

293 Q. Who was it that took it?

A. I don't know, sir. It was Mr. Basset came and wanted to buy my potatoes from me. I told him I wouldn't sell them.

Q. What time was that?

A. It was in the fall, I don't know,—last part of September or first part of October.

Q. Had you harvested them?

A. Some of them.

Q. Were these stolen, the ones that you harvested or the ones still in the ground.

A. No, they were still in the ground.

Q. You don't know how much it was that were stolen or taken away?

A. No, I don't. There must have been pretty near 100 hills that was dug up and stolen.

Q. You don't know who did it?

A. No, sir.

Q. Did you not, right after the fire, or rather, in the fall succeeding the fire, when the new McCord block was being built, enter into a contract for a lease of the rooms in that building before it was completed?

A. No, sir.

Q. Did you not enter into a contract in that fall by the time it was completed?

A. I rented some rooms there, yes.

Q. How many?

A. Three.

Q. How?

A. Three rooms.

Q. That was in the fall of 1892?

A. Yes, winter of 1892.

294 Q. Beginning of the winter?
A. Yes, sir.
Q. In what months?
A. It was winter, it was in December, I think; first of December. December, 1892.
Q. And it was the following January you found that there was some question as to whether or not your proof would be accepted?
A. Yes, sir.
Q. And as soon as you found out you went out to the land or sent Mrs. Jacobus out?
A. Well, I went out there.
Q. And she too?
A. And then when she came back from Chippewa why she went right out.
Q. What time did she come back, Mr. Jacobus?
A. I think it was in January sometime.
Q. Of '93 that would be?
A. '93, yes.
Q. Did she live there continuously during the winter?
A. From the time she went out there and stayed the whole—I don't remember whether it was one or two weeks before she came back again, and went out again in February, and then she took sick, and she came in town, and that is the time I stated before she was sick there.
Q. How long was she sick?
A. She was sick pretty near 6 weeks.
Q. Where was that?
A. That was in town.
295 Q. Where you had the leased rooms?
A. Where I had them rooms, yes
Q. When did she go out again after she recovered from her illness?
A. I don't remember whether it was in April or not.
Q. And then did she remain there during the summer of 1893?
A. Yes, most of the time, yes.
Q. Can you say what proportion of the time she was there in 1893?
A. Well, she was there about two thirds of the time, I guess, during the summer.
Q. How often did you go out there in the summer of 1893? Just about the same as you did in 1892?
A. Not quite so often, no, sir.
Q. Not so much—What year were you elected town treasurer?
A. In 1893.
Q. And then again this year?
A. Yes, sir.
Q. Who were your witness- at your final proof, at the time you made this attempt to prove up?
A. It was H. H. Augusta, at the time of final proof——

Q. At the time you made final proof?
A. Yes.
Q. September, '92, ain't it?
A. September 20th, I think.
Q. Who were your witnesses?
A. H. H. Augusta and William Rusk.
Q. William Rusk?
A. Yes, sir.
Q. What did you testify at that final proof that your improvements were worth?
A. I don't remember.
296 Q. Can't you remember very nearly?

Mr. WHARTON: If you can't remember, Mr. Jacobus, what you testified to, I would insist that you don't answer the question.

A. I don't remember positively what I did.
Q. What is the difference in value of the improvements on the land now, or at any time this contest was brought, we will say, and the time you made this attempt to prove up,—how much more value?
A. I think you mean my supplemental proof, do you not, because I made my final proof——
Q. I am speaking about your first proof, in September, 1892,—what was the difference between the value of your improvements then and now, we will say?
A. Oh, I think it was about $25 more now.
Q. I will ask you if Mr. Rusk, referred to as one of your final proof witnesses, and Mr. Marlette, are your witnesses here in this case now?
A. Yes, sir.

By Mr. Ross:

Q. I want to ask you whether you ever rented rooms in what is called the old McCord block, Wood-McCord block?

Objected to, as under the rules it is not proper for two attorneys on the same side to cross-examine the same witness.

By Mr. SMALLWOOD:

Q. Did you ever?
A. No, sir.

297 Mrs. L. E. JACOBUS was called as a witness and being duly sworn testified as follows:

By Mr. WHARTON:

Q. Mrs. Jacobus, you are the wife of the defendant, Phillip W. Jacobus, in this case?
A. I am.

Mr. Ross: We object to the witness testifying, on the ground that it has been disclosed that she is the wife of Mr. Jacobus, and therefore under the Wisconsin rules not competent as a witness either in civil or criminal action.

Mr. WHARTON:

Q. Mrs. Jacobus, I am going to try to make my questions comprehensive, and shorten the testimony if I can. I wish you would state in your own way how much of the time you resided on the land embraced in Mr. Jacobus's homestead entry during the year 1891?

A. You want me to go on and state it in my own way?

Objected to as irrelevant.

A. Well, I went out there in February, and then I stayed there right along until Good Friday. Then I went to Superior, and I stayed there 10 days. Then I went back, and I didn't leave the claim until about a week before the 4th. And then——

The RECEIVER: What year?

A. '91. Then I stayed there till the day after the 4th.
298 I went back again, and didn't leave the claim, unless it would be for a day over to the neighbor's, until September. I was there three months and never left the claim, and then I went to town and stayed two weeks.

The RECEIVER: Iron River.

A. No, Superior.

Then returned back again, and didn't leave until November. Then went to Chippewa and stayed there six weeks. Then returned back again, and I stayed right along just the same. Never was off the claim, only when I was to Chippewa those six weeks, was the longest that I was ever off.

Q. In the year 1892 up to September 30th how much of the time were you on the claim?

A. Well, I was there all the time except the time when I would go to Iron River and stay there a few days. And once in June I left,—that was the time Phil's mother died. They wanted me to go over to the funeral. Sent a dispatch out, I couldn't go, for I wasn't feeling well. I helped the man put in the potatoes. Then I fell sick. Mr. Augusta came up after Friday, so he said I had better walk along in. I went in and went to bed, and stayed there from Friday till Wednesday. And then I got up, and then I took bed again and stayed there until the 3rd of July, in bed. I was in bed continuously, the 3rd of July. I got up the 3rd.
299 Thought I would be up for the 4th. Were going to have a little time there, and then I wanted to go back that next week. The doctor said I couldn't stand to ride over the roots, so they took me out next Sunday. That was after the 4th.

Q. That was the first Sunday of July?

A. Yes.

Q. How long did you remain there that time?

A. Well, I stayed there right along. That is, I went out, and Phil came next Sunday, and then there was a fire; and then I went after the fire on Tuesday. I heard of it on Wednesday; Tuesday afternoon I went over to Mrs. Elleman's; that was all day. I stayed there all night. I was unable to walk back. She went up with me next day and stayed, and then I went back to her next day, and then I went home again and stayed there.

Q. Did you stay from that time on the claim up to the time the final proof was made?

A. I stayed there until November.

Q. Until November?

A. Yes, sir.

Q. What time in November?

A. It was after the 15th day. I am sure of that.

Q. Where did you go after that?

A. Went to Chippewa.

300 Q. How long did you remain away at that time at Chippewa?

A. I stayed there quite a few weeks. If I should say just how many.

Q. Well, you don't remember just the number of weeks, do you?

A. No, I don't. I couldn't say.

Q. When did you go back on the land in 1893?

A. In February.

Q. What time, do you remember, what time in the month?

A. No, I don't. I went in December.

Q. You were there in December, 1892?

A. Yes, and I was there in February.

Q. '93?

A. Yes.

Q. Well, now it was between these two visits that you went to Chippewa Falls, was it?

A. I went to Chippewa in November, after I left the claim, and stayed there after the 15th.

Q. But you came back in time to be on the claim again in December?

A. Yes.

Q. Now, when you went there in February, 1893, how long did you remain there on the claim at that time?

A. I stayed there a week.

Q. How long was you absent from the claim?

A. Well, I went out in March, but I had rheumatism. I couldn't stand it. I was taking electric batteries, so I went back and took some, and then I didn't go back until May.

Q. What time in May did you go onto the claim?

A. Last part of May; Mrs. Terriault went with me, for I wasn't well yet.

301 Q. How long did you remain on the claim that time?

A. I stayed there two weeks.

Q. Then how long was you absent?
A. I went back then again in July.
Q. You were there, then, two weeks in May.
A. Yes, sir.
Q. You were not on the claim in June, were you?
A. I was, because I went the last part of May and I stayed there in June.
Q. Stayed there the latter part of May and the fore part of June at that time?
A. Yes, sir.
Q. Then you came back what time in July?
A. It was about the last part of July.
Q. How long did you remain there at that time?
A. Stayed a little over two weeks. Mrs. Terriault went with me at that time, and Mrs. Detmeyer stayed one week, and then she left, and we stayed after she left.
Q. Then, after, how long was you away from the land?
A. Well, I went to Chicago then.
Q. Oh, that was the year of the World's Fair?
A. Yes, sir.
Q. Went to the World's Fair, did you?
A. Yes, sir.
Q. How long were you gone?
A. I was gone three weeks.
Q. Did you return to the land again when you came back from Chicago?
A. I was there different times, yes, sir.
302 Q. How soon after you came back, or in what months did you go back on the land?
A. In October I was there a few days.
Q. Will you state now, as fully as you can from recollection, what articles you have had in the house on the claim during the years 1892-3—household goods, furniture, cooking utensils, etc.?
A. Well, it is most always the same as it is there now, so I will tell you what it is.
Q. I want you to name the articles that you had there?
A. I have got a bed, it isn't anything fancy, but nice, good bed springs——
Q. You had, you mean?
A. Yes.
The RECEIVER: State what you had at that time only?
A. I didn't have a spring in 1891.
Q. Bed spring?
A. Yes, I did. I got it in the summer, but I had bed and springs, good mattress, and I had 6 comforters. I had a fancy robe. I had four pillows, I had 6 sheets, I had pillow cases plenty, I had three table cloths, napkins, towels, I had one table, sewing table, spread for table. I had two rocking chairs, I had a cane-seated chair, wooden chairs, bench, sewing-machine. There was a trunk there.

Then I had this—I had curtains, real curtains, on the windows. I had a curtain drawn through the room, and one on my wardrobe.

303 I had curtains all around my dish cupboard, I had two lambrequins. I had some fancy articles. I had a lamp, a clock, a looking-glass. I had tidies on the rocking-chairs; had a carpet, and some oil-cloth on the floor, and I had a good stove, and all the things that belongs to it, I had dishes.

Q. What kind of dishes?

A. I had white dishes. I had a dozen and a half plates. I had two vegetable dishes. I had two platters, two other other bowls; and I had half a dozen glasses, spoon holder, and two dippers, and different little fancy dishes. I had silver table-spoons, teaspoons, knives and forks, and jars, wringer, tub, washboard. I had a foot-stool.

Q. Now, let me call your attention to another matter: Had you any such thing as tools for working on the place with?

A. We did.

Q. What had you?

A. We had saw, axe, hoe, a rake, hammer, screw-driver, two hoes, and had a grub-hoe; and we had two saws, hammer, screw driver, and all such little things.

Q. You generally employed the parties to do the work in the way of cultivation of the land and to clear it up except the first clearing, didn't you?

A. Mr. Jacobus did that,—two men.

Q. You done the employing after that, usually?

A. Yes, I did. I done a good deal of bossing the men.

Q. Had you all of your household goods that belonged to

304 Mr. Jacobus and that belonged to you, with you on the place?

A. Yes, I did, excepting what he had in the room in the shop that he needed there.

Q. Now, when were these goods, if ever, removed from the house?

A. There was no,—never been removed, only what has been stolen lately. They have stolen my knives and forks and different things.

Q. I would like to call your attention to one item, and see whether you have forgotten it or not?

A. I have the sewing-machine removed, because it got awful rusty.

Q. That is the only article you have removed?

A. That is the only thing I took away from there—and my wringer.

Q. During the years 1891, 1892 and 1893, up to September 12, have you had any home anywhere else except upon the land?

A. I have not.

Q. Have you ever remained upon the land any portion of the time by yourself?

A. I have, I have been there six weeks at a time that I never seen a woman.

Q. That is out in the midst of an extensive forest, is it?

A. Yes, sir.

Q. What was your object in remaining on the claim in the midst of an extensive forest by yourself?

A. Well, I had no one to stay with me and I didn't feel as
305 if we could afford to hire a girl. I had little Freddy Augusta there for nearly a year, but he was only six years old.

Q. You heard Mr. Hill, the young man, testify, I believe, Mrs. Jacobus?

A. I did.

Q. And will you state whether at any time you ever employed him to do any work on this place?

A. He sawed wood for me, or split it, rather,—and sawed it too.

Q. More than once?

A. Well, yes. He split some different times, twice. Of course I had a man to come and split wood. Mr. Rusk, German, was to come, make some wood. He didn't come, so Lenny came. I said I didn't have any wood. He said he would split some. I said if he would I would give him a quarter. Used to have anything like that. I got someone else part of the times. Sometimes when I used to have wood cut and split I got him again. Lenny Hill was there mostly every day, right there at the house, used to come over.

Q. Through what years?

A. In both '92 and '93.

Q. Do you remember any occasion on which he brought you some milk at the time you were sick?

A. I do. That was in 1892.

Q. What time.

A. That was after the fire.

Q. After the fire at Iron River, you mean?

A. Yes sir. I don't remember if it was in the last part of
306 August or September. I think Mr. Lowe would know better.

Q. During the summer and fall of '92 or winter of '92 and '93, you may state whether or not you had any residence in the village of Iron River?

A. We had sleeping rooms there.

Q. Did you have any place where you cooked your meals during that period?

A. We took our meals out.

Q. Do you remember where you did take your meals when you would be in Iron River during that period?

A. We took most of our meals to Mr. Seymour's. We went different times to Thomas's, and Mrs. Andrew. When I was sick they brought my meals to the house.

Q. You know young Helmer, the boy, George I think his name is, that was on the stand yesterday.

A. Yes, sir.

Q. Did you buy any beans of him in December, 1892?

A. Not that I remember, I am sure I didn't.

Q. If you were not at that time keeping house, what would be the necessity of buying beans?

A. Well, I didn't buy any. He was there most every day with cabbage or something. I told him I didn't want them.

Q. Has he been there looking around where you were staying in Iron River, within the last few months, frequently or not?

A. Well, he has been around there quite often.

307 Q. Did you have any crop on this place in 1891?

A. We did.

Q. State whether or not the crop was harvested?

Objected to as immaterial.

A. It was.

Q. Do you know about how many potatoes you raised that year?

A. We had a good many, but not so many as in 1892.

Mr. SMALLWOOD: We wish to enter a general objection as to all questions relating to 1891.

A. I couldn't say just how many, because we would go in and get pan after pan out of the garden.

Q. Before digging season?

A. Yes. And we used them in that way. And there was always quite a good many there would come and stop for dinner and supper and in that way we used a good many.

Q. What other vegetables had you in 1891 except potatoes?

A. I had lettuce, had radishes, parsnips, cucumbers, corn, turnips and onions.

Q. Have any beans?

A. Beans, peas, beets. I planted them myself.

Q. I would like to call your attention to another vegetable, though I may be mistaken. I want to inquire if you didn't have some squashes there in 1891?

A. I did.

Objected to as leading.

308 Q. In 1892, what had you, if anything, in the way of a vegetable crop?

A. We had a good deal more potatoes than in 1891, and we had just the same of all vegetables as we had the year before, if that will do, excepting tomatoes and cabbage. We had in 1892 what we didn't have in 1891.

Q. In these years did the vegetables that you planted there mature in good shape?

A. They were very nice.

Q. What did you do with the potatoes you raised in 1892?
A. We sold 6 bushels to Mackmiller.
Q. The balance of them, what did you do with them?
A. I used them.
Q. In 1893, did you have anything planted in the way of vegetables on the claim?
A. We did.
Q. What was it?
A. We had potatoes, lettuce, radishes, parsnips and beets. The cabbage didn't do well, so we didn't plant any more.
Q. Was the crop of 1893 harvested?
A. Yes. We used some radishes and lettuce and parsnips. The deer eat up a good deal of the rest, peas and so on. They would come in the night and eat it all, and the potatoes were stolen.
Q. Were all the potatoes stolen that year?
A. They were, excepting there was a few that we dug to use; but the others were stolen. You could find some small ones around yet.
309 Q. Mrs. Jacobus, during those years, 1891–2–3, you may state whether or not the house you lived in there on the claim was a good, comfortable house at all seasons of the year?
A. Well, I prefer it over any in Iron River.

Objected to as leading.

A. It was prepared very nice, ceilings and sides. I wouldn't put it by any. It didn't freeze where we had our potatoes, and they were in the box and they never froze—and all my fruit.
Q. Did you put up any fruit?
A. I did. I put up blueberries and raspberries. Made jell- out there.
Q. Did you do this work. Did you pick them?
A. I picked them.

12 m., case adjourned to 1:30 p. m.
1:30 p. m., case resumed pursuant to adjournment.

Q. Mrs. Jacobus, if you wish to make any explanations as to some of your testimony before dinner you may make it?
A. I said I left in November, but it was December, and I came back in January.

Mr. SMALLWOOD:

Q. What year was that?
A. In 1892. I left in 1892 and came back in 1893.
By the RECEIVER: That refers to the time you went to Chippewa Falls, as I understand it.
A. Yes, sir.

Cross-examination by Mr. SMALLWOOD:

310 Q. You stated, Mrs. Jacobus, that on one occasion you were on the land as long as six weeks, didn't you?

A. Yes.

Q. Did you tell us what particular occasion you were on the land as long as six weeks, didn't you?

A. Yes.

Q. Did you tell us what particular months those five weeks were in?

A. It was in July, August and September. I meant that those six weeks I was all alone, that I had no one staying with me.

Q. What year was that?

A. That was in 1891.

Q. You were by yourself?

A. I was all alone. I had no one to stay with me. What makes me remember it more is because Augustas came down once, and then they were visiting in Minnesota, and I had no one at all. So most everyone around there was away.

Q. At any time during 1891–2–3 was there any more than you and your husband out there?

A. No, sir. Augusta's—this little child that I had.

Q. Temporarily with you?

A. Little child. And then there was Miss Brown, now Minnie Jones,—at that time she stayed with me six weeks.

Q. Where was that?

A. That was out on the claim.

Q. That is the six weeks you refer to?

311 A. She stayed with me. It was after I came back from Chippewa that time in 1892 she stayed with me in the spring.

Q. Spring of 1892?

A. Yes, sir.

Q. Where is she now, here?

A. No, she is not. She proved up on her claim and went out.

Q. You stated on your direct examination you were there in 1892 all the time except when you went to Iron River to stay a few times; could you give us, Mrs. Jacobus, a little more definitely those particular times in 1892? Just commence in the first part of the year, as near as you can remember?

A. '92?

Q. Yes?

A. I went there Easter and stayed about a week in Iron River. Then I went to Superior for a few days, and came back, and went out on the claim, and I was sick. Then I went on the claim again and stayed there up until June.

Q. About what time was this that you went to the claim that you speak of?

A. I can't say the dates.

Q. Give it as near as you can recollect it now?

A. Easter was in April. Then I went back in April, and soon, stayed a few days after Easter. Then I went back on the claim. I don't just know when Easter was then. I stayed all the time until June, and it was towards the middle or last part of June when I came in.

Q In 1892?

A. Yes.

312 Q. From April until——

A. Well, I never was away over two weeks at a time. That was the longest except when I was in Chippewa.

Q. Were you on the claim in January, 1892, Mrs. Jacobus, in 1892?

A. I was, in the last part of it; no, in February, came back from Chippewa. I don't mean to say anything wrong, but my memory isn't——

Q. I think you did say February. Then how long in February did you remain there?

A. I stayed a week.

Q. Then it was after that that this April——

A. I went out in the last part of March or April, I don't remember just, and then I was sick with the rheumatism.

Q. How long were you sick, then Mrs. Jacobus?

A. I had been sick from the winter on, I wasn't very, but still I would be around; and then I commenced taking these electric treatments.

Q. When you went away in April it was on account of your sickness, wasn't it?

A. Yes, it was.

Q. Did you have treatment down at Iron River?

A. I did. I was doctored by Dr. Wood, and by Merrill, and took electric treatments of Mrs. Smith.

Q. How long were you under treatment there then at Iron

313 River in the spring of 1892?

A. Why, the doctor didn't come every day, but they would give me medicine, and I went to Mrs. Smith for a few weeks every day. Some days I didn't go. I didn't feel able to.

Q. Is that when you only had a bedroom there, but were not keeping house?

A. I wasn't keeping house. Didn't commence keeping house until in last November or October.

Q. Later in the fall—well, not—you were boarding then, were you?

A. Yes, we were.

Q. Didn't you take your meals in your rooms?

A. We didn't.

Q. Were these rooms there the rooms in connection with the barber shop, or were they in another building?

A. Well, yes, we had a room in the back of the shop, and then I was out on the claim, and when I came in the room was so uncom-

fortable I said I couldn't stand it when I was sick, so Mr. Jacobus said he would try and get another room. He only would have kept one room, but the house was laid out so we had to take them all, so we had our sleeping rooms there.

Q. Do you know what time it was when you moved into the new apartments?

A. It was in December, I think, that we spoke about getting them rooms.

Q. Do you mean December, 1892?

314 A. That we spoke about getting the,—I don't just remember.

Q. I believe you didn't understand what I said that time, when you moved in in the spring and were sick. I want to know just where you were located. Just tell us what you did when you came in and were under treatment?

A. I was in bed, and laid there for nearly 5 weeks, and then I recovered so as to go back on the claim. I wanted to go right after I got up and the doctor wouldn't let me.

Q. How soon did you go back?

A. Oh, I don't know——

Q. About what date was it?

A. On Sunday after the 4th.

Q. After the 4th of July?

A. Yes, sir.

Q. Then how long did you remain there then, Mrs. Jacobus?

A. I stayed until after we proved up. that I didn't go to town at all, and then I went to town and went back again and stayed, as I said, until the last of November or December. I wouldn't say just, but I am sure it was December.

Q. What was it you went back after proving up?

A. I didn't stay more than a few days in Iron River.

Q. Was it in July that you returned to the claim?

A. No.

Q. Or was it in August.

A. The proof was made in September.

315 Q. Then you mean to say that when you went there in July you remained till after your proof was made in September?

A. On the claim, certainly, yes.

Q. You didn't go to town at all during all that time?

A. Yes, I did. I went once.

Q. When?

A. After the fire was, right soon, stayed, I think, two nights. I walked in. Then we drove out, part of the way, with Mrs. Elleman. She walked with me.

Q. That was the only time you was in town from July?

A. Until after we made proof in September.

Q. You don't know what date that was in July, but it was immediately after the 4th?

A. No, soon after the fire.

Q. Soon after the 24th, was it?

A. Yes.

Q. Can you tell pretty nearly the date that you had to go back after final proof; go back to town again. You say you stayed until final proof or until after final proof?

A. Well, I don't just remember. I went to town and stayed a few days, and then went back again and then stayed until in November, first few days of November. And I can't say for certain that I went last of November or went in December, it was so near the last.

Q. What year was it that somebody stole part of your crop of *your* potatoes?

A. '92.

316 Q. In the fall of 1892, along in November sometime, is the time you went to Chippewa, was it?

—. Yes, I think it was in November or December.

Q. Late in the fall or early winter sometime?

A. Yes. I can't say whether it was in November or December, it was so close.

Q. How long were you gone then, Mrs. Jacobus?

A. I think I was gone 5 or 6 weeks. I had a sore finger before I went. I remember that I said I couldn't do anything at home in the woods.

Q. Then you came back the latter part of the year?

A. The latter part of December, sometime about Christmas.

Q. And went out on the claim?

A. I was there all the while, yes.

Q. From the latter part of the month?

A. Yes, sir.

Q. How long did you stay then?

A. I stayed then right along.

Q. How long?

A. Well, after I had that sore finger, that was the time this lady stayed with me, and I was, I don't think, going to town there. We stayed there six weeks at a time when she was with me.

Mr. WHARTON: I would like to understand whether this is the spring of 1893 she is testifying to?

317 Mr. SMALLWOOD: Early part of the year 1893.

A. I don't mean that. I mean 1892.

Q. I was talking about latter part of 1892 and beginning of 1893?

A. Well, I went out in February, I said, and then I went out in March or April, and then I didn't go out again until May. I misunderstood you.

Q. During that whole winter, early part of 1893, how much were you out there, about?

A. Well, I was out there about a week in February, and then I was out there in March or April, or whenever it was. I didn't stay more than two weeks then because I was not able. Then when I

went out again I stayed two weeks at a time. Mrs. Terriault was with me then.

Q. Were you out in December, preceding that December, 1892? You were not, were you?

A. No.

Q. Now, after April, 1893, when were you there again?

A. In May.

Q. How long?

A. I was there two weeks or so,—might have been a day or so over.

Q. Then again after May when were you out there?

A. I went back in July.

Q. How long were you there then?

A. I was there then about two weeks. Mrs. Terriault was with me then, and this other lady.

Q. Then again, were you out in August?

318 A. No, sir. Yes, August. We went last part of July, and it was August before we came back.

Q. First part of August?

A. Yes, sir.

Q. Were you there then any more in August except that first part?

A. No, when I went back home I went to the fair.

Q. How long were you at the fair?

A. I was gone until the last part of September.

Q. When did you go back to the claim after that?

A. After we made supplemental proof?

Q. No, after you came from the fair?

A. From the fair,—we went out once in after that, I think it was in November, I am not sure, and then we were out last Sunday.

Q. In November how long did you stay there?

Objected to as immaterial in this case, whether there were at all after the 12th day of September, 1893, day of supplemental proof.

A. I always felt as if that was my home there. I left everything as it was, and I took pleasure in going out there.

Q. You wouldn't object to answer about how long you were there in November, 1893?

A. Well, I went more for hunting than anything else.

Q. You felt that you had completed your residence then?

A. I did, but I never meant to give it up, because I have it yet and intend to keep it.

Q. Do you know when these potatoes were stolen?

A. I don't, but must have been stolen in September or October.

319 Q. Sometime when you were probably at the World's Fair?

A. They were taken before I went out.

Q. That would be during your absence?

A. It wasn't in November. It was in October, because hunting season was in October this year.

Q. And the last time was January when you were out this last year?

A. This last year?

Q. Yes?

A. Last Sunday.

Q. Now, Mrs. Jacobus, you spoke of the sewing machine you had there, and you never moved it. How long did you have that out there?

A. I had it out there all the while I was there.

Q. When did you move it there?

A. When did I move it there?

Q. Yes?

A. I moved it there in 1891.

Q. And it is still there?

A. No, it is not. It is in Iron River now.

Q. How long has it been in Iron River?

A. I took that in after the winter after the fire. That was in 1892. I got that in the spring of 1893.

Q. In bad health, delicate health, most of the time, you have been out there?

A. Yes, I have always.

Q. You didn't run that machine out there, did you?

A. I did, because I used to do up my sewing. I was lonesome.

320 Q. You had some help, didn't you?

A. I did.

Q. Wasn't the young ladies that was with you helping you?

A. I done my own sewing there.

Q. At the time you were housekeeping in Iron River, in the fall there, did you do any household work?

A. I didn't keep house in Iron River in the fall,—it was the winter.

Q. Winter rather. I beg your pardon for saying fall. I think it commenced in December, didn't it, somewhere along there?

A. It was in November or in October.

Q. Did you do any work during that time?

A. I did all my own work, only hired my washing done once in a while.

Q. These times you were out on the claim did you hire someone to do your washing then?

A. I used to do part of it, but I couldn't do it all. When I would drive in I would take some along and have it done, big pieces. Of course we had water far to get, and it was kind of hard sometimes.

Q. Did you receive part of the purchase money for this land when it was sold, and was there any part of it paid at all?

A. All I have ever seen of it was $50.

Q. You signed the deed, though.

A. I did.

Q. You were satisfied, though, that there was some of it paid or you wouldn't have signed the deed, would you?

A. I thought it was, but I have not seen any since of it.

321 Q. As a matter of fact you don't know, then, that there was any consideration paid outside of the $50, do you?

A. I know that we were in debt, and Mr. Jacobus said he had to pay it.

Q. You don't know from your personal knowledge of any consideration having been received for the land except $50?

A. That is all I got.

Q. Do you know how much is owing on it yet?

A. I don't know. Mr. Jacobus never tells me any of his business.

Q. These times when you were out there, particularly the time, the six weeks in 1891, how often was Mr. Jacobus out to see you?

A. He was in Superior then. He didn't come so often. He used to come, oh, every two weeks, and it has been as much as three weeks. He would come out Sundays.

Q. Did you ever figure up how much in all you were on the land in the year 1892,—how many weeks?

A. 1892?

Q. Yes, the whole of the year 1892?

A. I never figured up, but I know I wasn't away any time only when I have to be.

Q. You couldn't tell just how many weeks you were away or how many you were on there can you?

A. Well, I was only away when I was sick, and when I was in Chippewa that time, and then when I was in town for a few days,—that is all. No one could ever say that I didn't live there.

322 Q. No, I am not questioning but that you did the best you could. In 1893, how much of your time were you on the claim and how much were you away?

Objected to, for the reason that he has gone over that ground and asked those questions on cross-examination, explicitly, when she was on the land in 1893 and when she was away from the land, and she fully answered all of those questions.

The RECEIVER: He wants her to make a computation.

Q. Did you ever reckon up or compute how much of the time you were away?

A. I didn't. I never thought it was necessary, because I always stayed there and wasn't away more than I could help. I would rather be there, even, than in Iron River.

Q. Mrs. Jacobus, how long is it that you have been in rather delicate health,—ever since you took the claim?

A. I have been sick for the last 16 years.

Q. You have not really been a strong woman at any time since you took the claim?

A. Never.

Q. When you were boarding, took your meals out, the time you speak of, in your direct testimony, do you know what rate of board you and your husband were paying?

A. I don't know how much he paid. We generally had
323 meal tickets. I think they were $4 or $4.50 meal tickets.

Mr. WHARTON: Per week do you mean?

A. They were meal tickets, 21 meals.

By Mr. SMALLWOOD:

Q. That crop of 1892 you spoke of having sold some six bushels to Mr. Mackmiller?

A. I did.

Q. How much was the balance of it, Mrs. Jacobus, to the best of your recollection?

A. Well, there was, might have been, from two bushels and a half to three bushels that I left there, when I went to Chippewa. Packed them all up, so they didn't freeze, and then we had been using ever since they was fit to eat until we dug them.

Q. Were those potatoes there when you came back, as you left them?

A. They were.

Q. Could you tell us about the date when you and Mr. Jacobus got rooms in the new building and went to keeping house there, and about how long you remained there?

Objected to, as it assumes that the witness has testified that they went to keeping house in the new building in Iron River, which is not the fact, and if they have reference to after the supplemental proof was made, then it is objected to as not proper evidence.

A. It was, though. We didn't keep house until after we made supplemental proof.

324 Q. What time was that? When you commenced?

A. In October.

Q. '(o—

A. '93.

Q. Do you know what time in October?

A. Well, I don't just know. When I got back here first we went and took our meals out most of the time until I got the house settled,—got things.

Q. Do you know whether Mr. Jacobus leased those rooms, or rented them,—do you, there?

A. I don't know anything about what arrangements he made, because he wasn't never sure that he would get the rooms.

Q. Didn't you and he have some talk about that,—leasing them, or something like that?

A. Yes, but that was another house. Always said that they should see. Didn't think anything about getting the rooms. There was no rooms to be had in Iron River.

Q. When you leased them in October, or took possession of them, how long had the building been built there?

A. Well, it was built after the fire the year before. Then it was finished up in the winter sometime.

Q. In the winter?

A. In December.

Q. Going out of 1892?

A. Yes, sir.

Re-direct examination.

By Mr. WHARTON:

Q. You said something in answer to Capt. Smallwood to
325 the effect that you went out there to hunt in October, 1893. You have done some hunting, then, since you have been out on that claim, have you?

A. I have tried to.

Q. Didn't you keep a Winchester there during the time that you were there, too?

A. No I didn't. I had a Marlin.

Q. That in addition to the articles you had already enumerated?

A. Yes, sir.

Mrs. EMMA DEITMEYER was called as a witness, and being duly sworn testified as follows:

By Mr. WHARTON:

Q. Where do you live?

A. Iron River.

Q. Are you acquainted with Mr. and Mrs. Jacobus?

A. Yes, sir.

Q. Are you acquainted with Mr. Jacobus's homestead out in the woods?

A. Yes, sir.

Q. Have you been out to that homestead?

A. Yes, sir.

Q. When?

A. Last of July, '93, and first of August.

Q. How long were you there at that time?

A. One week.

Q. Was there anybody there with you?

A. Mrs. Jacobus was there, and Mrs. Therriault was there.

Q. Did you look around the place any at that time?

A. Yes, sir.

326 Q. You may state whether or not there was any crop growing there when you were there in July and August, 1893?

A. There was.

Q. What did it consist of?

A. Potatoes and radishes, and well, all kinds of vegetables there were planted.

Q. How was the house supplied with furniture, cooking utensils and other matters of housekeeping outfit? You may state in a general way. I don't care to have the articles all named over again.

A. They had everything that I thought was enough for to keep house.

Q. State whether or not the house at that time was comfortable to live in?

A. I think it was. I thought it was.

Q. You have been acquainted with Mr. and Mrs. Jacobus for how long?

A. I didn't know them to speak to until in 1892.

Q. Did you see them about the village of Iron River during the season of 1892 at any time?

A. Well, I have seen Mr. Jacobus there. I never seen Mrs. Jacobus there very much.

Q. State whether prior to October, 1893, you knew of them having a residence in the village of Iron River?

A. I didn't know them to be keeping house, only they were sleeping there.

Q. Do you know anything about when they did, if ever, begin keeping house in Iron River?

327 A. Well, I was away last summer part of the time, and when I came home in October they were keeping house.

Q. Is that the first time that you ever knew of them to be keeping house in Iron River?

A. Yes, sir.

Q. You never was on this claim at any other time prior to July, 1893?

A. No, sir.

Mrs. JENNIE THERRIAULT was called as a witness, and being duly sworn testified as follows:

By Mr. WHARTON:

Q. Where do you live?

A. In Iron River.

Q. Are you acquainted with Mr. and Mrs. Jacobus?

A. Yes, sir.

Q. How long have you known them?

A. Well, ever since I was a little girl.

Q. Do you know his homestead?

A. Yes, sir.

Q. Have you ever been to it?

A. Yes, sir.

Q. When?

A. That was in 1893.
Q. What time in the year?
A. About May, it was the first time.
Q. How long were you there that time?
A. A little over a week.
Q. Who was with you?
A. Mrs. Jacobus.
Q. Had the snow gone off at that time?
A. Yes, sir.
Q. Do you remember whether there had been any planting done at that time?
A. Yes.
Q. Were you ever there after that?
A. Yes.
328 Q. When?
A. It was in the first—last of July and first of August,—anyhow, in August, I know.
Q. How long were you there at that time?
A. Two weeks.
Q. Who was with you?
A. Mrs. Jacobus and Mrs. Deitmeyer.
Q. Was Mrs. Jacobus there all of the time?
A. Yes, sir.
Q. You may state in a general way how they were fixed in the house on the homestead for living?
A. They were very comfortable,—what I call comfortable.
Q. Have you known of them keeping house in the village of Iron River at any time before October, 1893?
A. No, sir. Only that they had sleeping rooms.
Q. Well, when they had sleeping rooms there prior to that time, do you of your personal—know of their taking their meals at hotels?
A. Yes, sir.
Q. Have you been in the rooms before that time?
A. Yes, sir.
Q. Did they have any cooking apparatus, or anything of that kind?
A. No, sir.
Q. When you were on the homestead in July and August, 1893, did you observe whether there was any crop growing there at that time?
A. Yes, sir.
329 Q. Have you been at their rooms since October, 1893.
A. Yes, sir.
Q. At Iron River?
A. Yes.
Q. You find any difference in the appearance of the rooms, or what there was in the rooms, when you went after October and the time you were there prior to that?
A. Yes, sir.

Q. What difference was there?
A. The cooking outfit, is what you mean?
Q. Was there anything else in addition to what they had before that you remember of?
A. Yes, different articles of furniture.
Q. You have not been at the homestead since August, 1893, have you?
A. Not that I remember.

Cross-examination.

By Mr. SMALLWOOD:

Q. Were you ladies picking berries when you were out there?
A. Yes, sir.
Q. What were they,—raspberries?
A. Raspberries.
Q. Were you putting up the fruit?
A. Yes.
Q. In May it was just a visit you made simply?
A. That is all I did.
Q. Had no particular purpose except to visit?
A. No.

JOHN TOOMEY, being called as a witness for the defendant Jacobus, was duly sworn and testified as follows:

330 By Mr. WHARTON:

Q. Where do you live, Mr. Toomey?
A. Iron River.
Q. Are you acquainted with Mr. and Mrs. Jacobus?
A. Yes, sir.
Q. How long have you known them?
A. I have known them since July, 1892.
Q. Since July, 1892, have you ever done any work for Mr. Jacobus?
A. Yes, I did quite a bit of work for him.
Q. What was the nature of that work?
A. Well, I have been back and forward to his homestead a few times, and then he has had a horse of me, horse and saddle.
Q. You furnished him with a horse and saddle?
A. Yes.
Q. How frequently in 1892 did you furnish him with a horse and saddle?
A. Well, pretty near every Sunday. All summer.
Q. And in 1893 did you furnish him any?
A. Yes, sir.
Q. Well, now, how frequently in 1893 did you furnish him with a horse?

A. Well, I was out to the homestead twice, and I sent a teamster out once.

Q. When you were out to the homestead twice, will you state what you did?

A. I went out with Mrs. Jacobus once. I took out Mrs.
331 Jacobus twice, and one time there was two other ladies with her, and I think in May that there was just one lady with her.

Q. Did you haul anything else except Mrs. Jacobus and these ladies?

A. Yes, I took out provision.

Q. Now, how late in the season of 1893 did this work run, do driving out there?

A. '92. Well, I went out in May and July. I think October, the last.

Q. You never done any work on the claim, did you?

A. No, sir.

Q. Prior to July, 1892, you had nothing to do with it?

A. No, sir.

Q. Did you ever furnish a team for Mr. Jacobus, or anybody else for him, when you didn't go yourself?

A. Yes, sir.

Q. When was that?

A. When he had a team, right along, pretty often.

Q. Well, in what year, I mean?

A. He had them in 1892, and he had a team in 1893, right along, several times. I couldn't remember how often.

Q. Did you ever help to load those teams before they would start?

A. Yes, sir.

Q. With what?

A. Provisions, groceries, flour and so on. Sometimes more of a load than I wanted to take.

Cross-examination.

By Mr. SMALLWOOD:

332 Q. How many times did you load them with provisions?

A. Pretty near every time I went out.

Q. How many times was that?

A. I went out, I guess, 4 times in 1892—hauled his provisions.

Q. How close were they together?

A. I couldn't hardly tell you how close they were together.

Q. Were they all in the latter part of the summer?

A. No, they was—I was out in August. Last of August, and right along from then until November.

Q. You went out right along, every little while, 4 times in all?

A. Yes, I might have been more, but I am sure that I was four times.

Q. And you took provisions each time?
A. Yes, sir.
Q. Take a load, did you?
A. Well, wouldn't probably be a load right down every time, but sometimes would be.
Q. What was the condition of the road between there and Iron River?
A. Road was good all but about two miles.
Q. It was good all during 1892?
A. Yes, all except two miles, about two miles.
Q. Could you haul a load over that road excepting those two miles in 1892?
A. Yes, sir.
333 Q. How about that two miles? Could you haul at any time a load?
A. You couldn't go to work and haul a good load.
Q. Could you haul a fair load over that?
A. Yes, sir.
Q. At all times?
A. Yes, sir.
Q. Did you have a double or single team?
A. Double team.
Q. How much did you haul in weight, do you suppose, at any one time there?
A. Probably 6 or 7 hundred, sometimes. Sometimes more, sometimes probably 10 hundred.
Q. That included persons as well as provisions?
A. Yes. Sometimes of probably 10 or 12 hundred. Sometimes, with the provisions, taking it all in all.
Q. How many is the most people you ever hauled out there at any one time?
A. Three besides myself.
Q. Where did you load these provisions? Whose store did you load them at?
A. At different places. Sometimes at Mr. Hessy's, sometimes Mr. Mackmiller's.
Q. How much is the most in weight of provisions that you ever hauled out at any one time?
A. I should say about 6 or 7 hundred.
Q. Name what it consisted of?
A. I couldn't tell you. Most provisions would be in boxes. I couldn't tell what would be in the boxes.
Q. Did you say something about hauling flour once?
A. Yes, I hauled some flour.
334 Q. How much flour did you haul out there?
A. Two or three 50-lb. sacks. Probably a couple of 50-lb. sacks at a time.
Q. Each time?
A. No, not every time, of course.

Q. How many times did you haul out a 50-lb. sack of flour?
A. I think I hauled it twice. I couldn't tell you exactly the stuff that I hauled.
Q. How many of these sacks did you haul in all?
A. I couldn't say.
Q. Couldn't say?
A. No, sir. I know there was——
Q. What did you charge him for the horse when you hired him the horse?
A. Horse and saddle?
Q. Yes, horse and saddle?
A. $1.50.
Q. That was for one day?
A. No, sir. He generally took it on Sunday and came back on Monday.
Q. You let him have that for the round trip?
A. Yes, sir.
Q. And for a team going and coming, what was your price?
A. $3.
Q. Were you doing business in Iron River during 1892 and 1893?
A. Yes, sir.
Q. Was Jacobus doing business there at the same time?
A. He was in the barber shop there.
Q. Did you ever go there to get shaved?
A. Yes, sir.
Q. About how often?
A. I must have gone there once a week. Sometimes I didn't.
335 Q. Most always see him there, didn't you?
A. No, sir. I didn't always see him there?
Q. What time would you go to get shaved generally?
A. I most always went fore part of the week. Probably Monday or Tuesday.
Q. That would be before he got back from the claim?
A. Well, sometimes before he got back from the claim and sometimes after he got back from the claim.
Q. You seldom went in the middle of the week?
A. Yes, just according to how busy I was. Sometimes I didn't have time to go.
Q. When you went in the middle of the week you always found him there?
A. No, sir.
Q. His trips generally out there was on Sunday and Monday,—returned about Monday when he hired those horses?
A. Yes. Well, that is when he had a horse and saddle.
Q. I mean, when he had a horse and saddle, when he took a team, how long was he gone?
A. Used always to come back the same day.
Q. Did you ever see Mrs. Jacobus in Iron River?
A. Yes, I have.

Q. Have you known her by sight at least for the last—during the years 1892–93?

A. Yes, sir.

Q. Do you know where they took their meals when they were in town?

A. No, sir, I don't.

Q. Do you know where they had their sleeping rooms?

336 A. Well, I seen them in the McCord block. I seen them go upstairs there, but that is about all I know.

Q. What block was that, the old frame building or the new?

A. No, sir, the new building.

Q. The new one is of brick, ain't it?

A. Yes, sir.

Q. You never were inside of their rooms that they had leased there in the McCord block?

A. Yes, sir. I was up there once.

Q. What time was that?

A. It was about 4 or 5 days ago, I think.

Q. 4 or 5 days ago?

A. Yes.

Q. That is the only time, is it?

A. That is the only time, yes, that I was ever upstairs. I probably been part ways up, but never was right straight up. I just called for them there, and sometimes maybe they wouldn't be ready. I would start and go upstairs and maybe meet them.

Q. Did you ever go to the door so you could see into the rooms before this time you mentioned?

A. No, sir.

Q. How, as to the trips in 1892. These four trips you spoke of were in 1893, were they?

A. '92.

Q. They were in 1892? Then how as to 1893? Did you make any trips out there then for them?

A. Yes, sir.

Q. Were they about the same in number?

A. No, I didn't go as often in 1893.

337 Q. You don't know how often you went in 1893?

A. Yes, I was twice myself, and had a hired man, he went once during 1893.

Q. You keep a livery stable, do you?

A. Yes, sir.

Q. How many livery stables were there in town?

A. Three, supposed to be, there.

Q. He might have hired his rigs from some other stable part of the time, mightn't he?

A. Yes, sir.

Q. You think he did, don't you?

A. Yes, I am pretty sure he did, for I see him drive around.

Q. Do you know where he went with it?
A. No, sir.
Q. Who was it that he hired his teams of that you saw him have?
A. Seen him drive around with Hobbs' team a couple of times.
Q. How long ago was that when you saw him driving this other team?
A. I see him last spring and last winter driving around with their team.
Q. What other times, couple of times last winter, was it?
A. Yes, I have seen him more than three or four times, I guess, probably, go driving around with other teams.
Q. How long have these other liverymen been carrying on their business there?
A. Hobbs, I think, commenced in the last part of 1892. I ain't sure, I ain't certain, and this other barn there commenced in 1892, last of 1892.
338 Q. Last of 1892?
A. Yes, sir.

By Mr. WHARTON:

Q. Those times you saw him driving around with Hobbs's team were all since the 12th of last September, weren't they?
A. Yes, I think they were.

TOM TOOLE being called as a witness for defendant, and being sworn testified as follows:

Q. Your name is Toole?
A. Yes, sir.
Q. Where do you reside?
A. Town of Washburn.
Q. Are you acquainted with Mr. Jacobus?
A. Yes, sir.
Q. And his wife?
A. Yes, sir.
Q. How long have you known them?
A. Well, I have known Mr. Jacobus since May, 1892.
Q. What was your business in 1892–'3?
A. Kept a boarding house in Iron River.
Q. What house did you keep.
A. Seymour.
Q. During the year 1892, you may state whether or not Mr. Jacobus boarded a portion of the time at your hotel?
A. Yes, sir.
Q. You may state whether at any time during that year his wife was with him? His wife was with him and took meals at your place?

A. Not very much.

Q. How about 1893?

339 A. Well, about the same, 1893. Didn't take very many meals there.

Q. How did they do their boarding? By the week, or did they have a meal ticket?

A. Meal ticket, principally. Used to pay cash sometimes, but not very much. Pay for the meals as they went along sometimes, but not very much.

Q. Did you know of them keeping house in Iron River at any time during the year 1892?

A. No, sir, I didn't.

Q. Did you, in 1893, at any time prior to October?

A. No.

Q. Since that have you known of them keeping house at any time in Iron River?

A. No, — didn't. I never was in their house.

Q. That is, you never was in their house, never was in their rooms?

A. No, I was in their room once.

Q. Well, when did they quit boarding with you at all, or when did Mr. Jacobus quit?

A. Well, I think it was about the time he went to the fair, after he came back from the fair.

Q. You couldn't state what month it was in?

A. I don't remember what month the fair was in.

Q. Well, the fair was from May till the 31st of October, I believe. Well, since they came from the fair, has he boarded with you as he did prior to that time, or taken meals since he came from the World's Fair?

340 A. No, not since then. Well, since they came from the fair, I went out of business there, but I have been around the hotel.

Q. About what time did you go out of business?

A. First of August, but I have been around the hotel a good deal since then.

Cross-examination.

By Mr. SMALLWOOD:

Q. When did you say they commenced boarding with you?

A. Commenced in the latter part of July, 1892,—time of the fire. They commenced right after the fire. I think a few days after started up.

Q. 1892?

A. Started up right after the fire.

Q. How long was it after the fire that you started up in business there?

A. I think about three days. I think on the 27th of July.
Q. They commenced boarding with you right then, soon after?
A. Just soon after started.
Q. Within what time?
A. Within day or two.
Q. Isn't it a fact that they have only taken meals there occasionally since then, now and then?
A. No, he used to buy a ticket. Of course he was gone a good deal of the time.
Q. Do you know where he was gone.
A. No. No questions. He used to pay for his board.
Q. But he didn't board regularly with you?
A. He boarded regularly with me when he was in town. I don't know any other place he boarded in town.

341 Q. Can you tell anything like how many tickets they consumed, how many meals they consumed, in this ticket buying, say, in the course of a week, on an average?
A. I couldn't tell. I think he had somewhere in the neighborhood of 20 or 25 or 30 tickets, something like that, all the time that he was there. I ain't got my book.
Q. When did he quit boarding with you?
A. Well, I went out of business there the last of August. He was about a year with me.
Q. How many meals was there on one of your tickets?
A. 21.
Q. She wasn't there near as much as he?
A. No, she wasn't there very much. Used to come and take a meal sometimes, stay a day or two. Was there a couple of days after the fire.
Q. Ever was there any time as much as a week?
A. No. Soon after the fire was there, couple of days or such a matter,—something like that. I can't just remember.
Q. Do you know where they took their meals before the fire?
A. Took their meals at the Augusta house, I believe. I see them there.
Q. You didn't start up in business then, really, until after the fire?
A. No, I didn't start in business until after the fire.

JAMES BATTLE being called as a witness in behalf of the defendant was duly sworn and testified as follows:

342 Q. Where do you live?
A. Iron River.
Q. Are you acquainted with Mrs. and Mr. Jacobus?
A. Yes, sir.
Q. How long have you known them?
A. I have known Mr. Jacobus since 1892.

Q. Do you know where the land is located that is in the controversy?
A. Yes, sir.
Q. Were you ever on that claim?
A. Yes, sir.
Q. When?
A. I was on in August, 1893.
Q. August?
A. Yes, sir.
Q. What were you doing there?
A. Done some clearing.
Q. About how much?
A. Well, from a quarter to a half an acre. I dare say half an acre.
Q. Whom did you do that work for?
A. Mr. Jacobus.
Q. How long were you there?
A. Well, I was out there nearly a month; not working all the time.
Q. Was he or Mrs. Jacobus, either of them, there during any portion of that time?
A. I couldn't tell you. I didn't meet him there.
Q. Who paid you for doing the work?
A. Mr. Jacobus.
Q. Were you there all that month, at that house, or were you part of the time somewhere else?
A. I was visiting a friend out there myself; stayed with him. I never stayed to Mr. Jacobus's house.
343 Q. Who were you stopping with?
A. Frank Wilkin.
Q. That is a mile and a half on the west of this, isn't it?
A. No, a little over half a mile.

HENRY SMITH being called as a witness for the defendant was duly sworn and testified as follows:

By Mr. WHARTON:

Q. Where do you live?
A. I live on section 7–48–8, Iron River, Wisconsin.
Q. How far is that from the land in controversy?
A. It is a little over a half a mile.
Q. Are you acquainted with Mr. and Mrs. Jocobus?
A. Yes, sir.
Q. How long have you known them?
A. I have known Mr. Jacobus since 1891.
Q. And Mrs. Jacobus, how long have you known her?
A. The same time.
Q. Were you on this claim at any time during the season of 1891?
A. Yes, I passed there frequently, on the road to Iron River.

Q. In passing there from your place to Iron River and returning, does the road pass immediately by the improvements on this claim?

A. Yes, pass at the edge of the clearing.

Q. Now, about how frequently did you pass there, say, during the summer season of 1891?

A. Well, I used to go by twice, or once every week for mail.

344 Mr. SMALLWOOD: Objected to, as testimony relating to 1891, same as heretofore.

Q. In 1892, did you pass there frequently or not?

A. Yes, passed very frequently in 1892.

Q. You may state whether during those times you ever saw Mr. or Mrs. Jacobus there?

A. Yes, I have seen them frequently.

Q. That is in 1892?

A. '92.

Q. What improvements had they there, say, about the 20th of September, 1892?

A. He has a very nice log house, I should judge about 14 by 16 inside, and exceptionally nicely fitted out inside. He had about 2 acres, between an acre and a half and two acres of clearing.

Q. In what manner was that clearing done?

A. It was done very nicely. It seemed to be all cleared very clean, raked, and all the small sticks picked up, and the trees on that acre and a half were cut down level with the ground.

Q. When you say level with the ground, you want us to understand, do you, that the stumps were not left two or three feet high on the ground?

A. Yes, sir.

Q. Stumps are not left—ordinarily in clearing in the woods out in that country people cut the stumps a foot and a half or two feet from the ground, do they not?

A. Yes, sir.

Q. Did you see any crop on the land in 1892?

345 A. Yes, there was quite a little area of grass, and some potatoes and some lettuce and radishes and some peas, and I remember seeing a bed of flowers.

Q. Did you observe in passing there or stopping there during that year whether or not there was any vegetable crop there that was cultivated?

A. Yes, it seemed very well cultivated.

Q. You have been in the house there frequently, have you?

A. Yes, frequently.

Q. It is from the examination then that you made when in the house that you make the statement that it was exceptionally well furnished and fixed up?

A. Yes, sir.

Q. In 1893 did you pass there frequently?

A. Well, not so frequently as in 1892, because I changed my road into Iron River. The town cut a road into this direction, and I don't pass there so often.

Q. Were you past there at all in 1893, or at the house in that season?

A. In 1893 I think I only was there twice.

Q. What time in the year?

A. Once in June, in the latter part of May or beginning of June, planting potatoes for Mrs. Jacobus, planting the potatoes in June, and again in August, for the purpose of seeing Mr. Jacobus about buying his potatoes.

Q. Did you at either of those visits see either of the parties, either Mr. or Mrs. Jacobus?

346 A. The first visit I saw Mrs. Jacobus and Mrs. Terrihault.

Q. Did you see her there at any other time in 1893,—that is, after the spring season opened?

A. Well, I wasn't there again until August. The time that I was there it was the latter part of May or beginning of June.

Q. That is the time you went to do this planting you speak of?

A. Yes, sir.

Q. How many potatoes did you plant at that time?

A. Planted a bushel basket full of seed and there was something over 100 hills.

Q. When you were there in August, afterwards, did you observe those potatoes?

A. No, sir, they was gone.

Q. They were gone then?

A. Yes, sir.

Q. You saw the ground where you had planted them at that time, did you?

A. Yes, sir.

Q. When you were there in August, was there any hay or grass on the land?

A. Yes, there was hay, and it was piled up; and there had been a wind sometime, and Mr. Kenney asked me to go and get his fork. And I was there and piled some of the cocks of hay up that had been blown over,—piled them up better.

Q. Mr. Kenney sent you there at that time for the fork?

A. Yes.

Q. That was after he cut the hay?

A. Yes, sir.

347 Q. Did you have occasion at any time through the season of 1892 to carry mail or any other matter in from Iron River to Mr. or Mrs. Jacobus?

A. Oh, prior to June I carried Mrs. Jacobus some mail several times.

Q. After that were you there much during the season?

A. No, sir, I was working.

JOHN WYLIE being called as a witness for the defendant was duly sworn and testified as follows:

Q. Mr. Wylie, where do you live?
A. Iron River.
Q. Are you acquainted with Mr. and Mrs. Jacobus?
A. Yes, sir.
Q. Are you acquainted with the land in controversy?
A. Yes, sir.
Q. What is your business?
A. Timber estimator, woodsman.
Q. Were you on this land any time during the season of 1893?
A. Yes, a great many times.
Q. Could you tell about what times you were there?
A. I was there in May, June, July, August, and since.
Q. Did you see either Mr. or Mrs. Jacobus there at either of these visits?
A. Yes, I saw Mrs. Jacobus there in May, July and August.
Q. How long were you there in May?
A. I was there several times in May.
Q. You were there several times in May?
A. Yes, sir.
348 Q. Did you see her there each of these times that you were there in May?
A. No, I remember seeing her once at the house, and twice, if I remember, the house was occupied.
Q. In July and August, you say you saw her there; how frequently were you there in those two months?
A. Several times,—probably four or five times.
Q. Do you mean by that, four or five different days?
A. Yes, sir.

Cross-examination.

By Mr. SMALLWOOD:

Q. What business are you engaged in?
A. Looking over timber, estimating.
Q. Estimating pine timber?
A. Pine timber, yes.
Q. How long have you been engaged in that business?
A. About ten years.
Q. Were you employed to examine this piece of land in controversy and estimate the timber on it?
A. Yes, sir.
Q. Who employed you?
A. McCord and McLeod.
Q. Are you still in their employ?
A. Yes, sir.

Q. How long have you been engaged in their service for that purpose of estimating timber land for McCord up here?
A. In this country?
Q. Yes, up here?
A. Since July, 1892. Last of July.
349 Q. You had worked for them before you came up here?
A. I had worked for McCord.
Q. Were you with him for several years?
A. Yes, sir.
Q. What did you make the estimate on this tract of land when you estimated it?
A. I couldn't say.
Q. Can't you remember approximately what it was?
A. I wouldn't want to make a guess of it. I have the estimate down in my book, but not in my memory.
Q. Could you come within 500,000 of what there was on it?
A. Oh, yes.
Q. From recollection?
A. Somewheres about 2 million, probably, or less.
Q. Was this before he bought the land that you estimated it, or after,—before McCord bought the land of Jacobus or after, that you made this estimate?
A. About the time, about that time. I couldn't say whether it was just before or just after.
Q. What is that class of timber worth in the stump there?
A. It is pretty hard to say.
Q. At that time? Just after this present time there is no sale for the timber, is there?
A. No, sir.
Q. About what was it worth at the time you made this estimate?
A. Well, it wasn't worth very much more then.
350 Q. Was it worth $3 a thousand.
A. No.
Q. Was it worth $2.50?
A. Perhaps it would be about $2 or $2 and a quarter.

THOMAS ROWAN, being called as a witness for the defendant Jacobus, was duly sworn and testified as follows:

By Mr. WHARTON:

Q. Where do you live?
A. Iron River.
Q. Are you acquainted with Mr. and Mrs. Jacobus?
A. I am.
Q. How long have you known them?
A. I have known Mrs. Jacobus about 23 years, and Jacobus probably 20.
Q. Are you acquainted with the land in controversy in this contest?

A. Yes, I am.
Q. In 1892, were you on this land?
A. I was.
Q. Frequently or otherwise?
A. Well, I was there often, several times.
Q. About how often?
A. Well, I was past there and through about 6 or 7 times.
Q. Covering what part of the season?
A. Summer season and winter season.
Q. Who was living there, if anybody, at those times?
A. I see Mr. Jacobus there, I think it was once, and I see Mrs. Jacobus there three times, and the rest of the times I didn't go in. I seen the door open and see her standing on the platform, once.

Q. Then a portion of the time you passed there you simply
351 traveled along the road?

A. Yes, sir.
Q. You were past there frequently in the year 1891?
A. I was.
Q. Whom did you see living there at that time, if anybody?

Objected to as irrevelant.

A. Mrs. Jacobus.
Q. See her frequently, or otherwise?

Same objection.

A. I see her quite frequently in 1891.
Q. Up to September 20th, 1892, how much clearing, if any, was there on the land?
A. Well, I don't know how much there was. There was an acre and a half or two acres now, and there was some cleared this summer.
Q. You mean last summer, don't you?
A. Last summer, I think there was an acre and a half; acre and a quarter to an acre and a half before that.
Q. Do you know about what time last year that clearing was done?
A. I think it was did in August.
Q. Is that a continuation of the original clearing?
A. Yes, sir.
Q. Did you see any crops growing there in 1892, or pay any attention to them?
A. I seen hay grow there. I see some radishes growing there, potatoes and garden stuff.

352 Q. Were you there any time prior to September 12th, 1893, during that year?

A. I was.
Q. At what time?
A. I was past there along in the spring, and I was there in August, and the latter part of July.

Q. Well, at either of those times did you find anybody living there?

A. I found Mrs. Jacobus living there in the spring, and I seen her there in August.

Q. Have you been there recently?

A. I have. Was there last Sunday.

Q. Did you count the trees that are on that clearing?

A. I did.

Q. How many were there?

A. Forty-two.

Q. Now, having seen the clearing in 1892 and 1893, I wish you would state whether any timber had had been cut out during that time?

A. Not to my knowledge.

Q. When did you make this count, you say?

A. Last Sunday.

Q. Was there snow on the ground?

A. Some.

Q. Enough to hide the stumps?

A. Well, no. Bare in places, and other places it was pretty low.

Q. Was there any indication of any timber having been cut out of there within a year.

A. Well, I couldn't swear to that. I say there was no timber cut in the last year, winter season.

353 Q. Then would you undertake to say that in September, 1893, there was practically the same number of trees in that clearing that there is today,—there was last Sunday?

A. I would, yes—No, I wouldn't say that there was the same number of trees; they might have cut some small ones down last summer.

Q. Was there any other improvements there besides the house and clearing?

A. Yes, there was a shed, woodshed.

Q. Was there anything around the clearing in the shape of fence?

A. Yes, sir.

Q. Were you ever in the house?

A. I was; eat there.

Q. Did you observe what they had in the house in the way of a housekeeping outfit?

A. I did.

Q. State in a general way how they were fixed up there?

A. They had a bedstead——

Q. I don't care for the name of the articles,—just in a general way, how they were fixed up?

A. Well, they were all right, in good shape.

Cross-examination:

Q. Did you hear Mr. Jacobus' testimony in this case?
A. Well, I heard part of it and part of it didn't hear.
Q. Did you hear him say how many trees there were in that clearing?
A. I am the man that counted the trees first.
354 Q. Did you hear him testify as to number?
A. No, sir, I didn't.
Q. Then when you say that there was only 42, and there was only, you say, 42 within that clearing, you said so on your personal knowledge?
A. Yes, sir.
Q. Are you positive?
A. I am positive.
Q. That that is the correct number?
A. Yes.
Q. There can be no doubt about that, can there?
A. Well, I don't think there can. I counted them.
Q. There can be no doubt that was the number last year?
A. Well, I said that they might have cut some small ones. I didn't see any that was cut. Didn't see any signs of any that was cut.
Q. You could see from looking at the stumps, from their appearance, whether there had been any cut in the last year?
A. I could, yes.

Re-direct examination.

By Mr. WHARTON:

Q. Now, Mr. Rowan, if counsel hadn't been so particular about the number of trees,—I wish you would state the circumstances of that count which you and Jacobus made last Sunday?
A. Well, sir, Jacobus and I went down. I counted the trees first, and Mr. Jacobus counted them trees about the same time.
355 He said there was 39 and I said there was 42. We went down into the house and he counted them again, and counted the trees. He said, "You are right, there is 42 trees." Then Mr. James O'Leary counted them also.

Re-cross examination.

By Mr. SMALLWOOD:

Q. What do you mean by saying that that is the whole number inside of the clearing?
A. That is the whole number inside of the clearing within this acre and a half or two acres which has been underbrushed.
Q. That this is all there is of the trees,—this is the number?

A. That is the number, yes.

Q. When you say only 40 within the clearing, you don't mean to confine yourself to the land which is being prepared for cultivation, but you mean the whole area that has been underbrushed, don't you?

A. Yes, inside the fence.

Q. Inside the fence?

A. Yes.

Q. And some of the land cleared that is outside of the fence, ain't there?

A. I don't know anything about that. What I counted was inside of the fence.

Q. Do you mean to say that all the clearing is fenced?

A. I couldn't say. What I see was fenced. This acre and a half or two acres was fenced.

356 Q. And although you examined so carefully as to count the trees and to be able to say positively that there are only 42, within the clearing, yet you cannot say that all the clearing is fenced?

A. Why, what I counted was inside of the clearing. About an acre and a half or two acres inside of the fence.

Q. It wouldn't take us near so long if you would answer my question, whether the whole clearing was fenced or not?

A. All that in the fence that was underbrushed.

Q. You didn't count some trees that were in the road?

A. No, the road, I didn't count that clearing at all.

Q. Didn't you count that part of the clearing just outside of the fence?

A. No, sir.

Q. How much is that outside of the fence that is cleared?

A. I don't know, I didn't pay any attention to it.

Q. This clearing of 1893, where was that done,—inside of this enclosure?

A. Yes, sir.

Q. All of it?

A. Well, what I see was inside the enclosure.

Q. The clearing of last year?

A. Yes, sir.

THOMAS LOWE, being called as a witness for the defendant, was duly sworn and testified as follows:

By Mr. WHARTON:

Q. Where do you live?

A. North half of section 7–48–8 west.

357 Q. How far from Jacobus's house?

A. About ¾ of a mile.

Q. In going from your place to Iron River, do you go past there, or did you any time since 1891?

A. There was a road going that way. I could go that way, but I didn't use it. I used another road that goes round by Cullom's, but I have used that previously, perhaps in 1891 I did. I don't know.

Q. Were you at this Jacobus homestead in 1892?

A. Yes, sir.

Q. How frequently?

A. Oh, quite frequently.

Q. During what portion of the year?

A. Generally during the summer, I think.

Q. Did you find anybody living there?

A. Yes, sir.

Q. Whom?

A. Mrs. Jacobus.

Q. Did you ever see Mr. Jacobus there during that year?

A. I saw him several times there on Sunday.

Q. Was there any crop growing there in 1892?

A. Yes, sir.

Q. Did you observe that crop to such extent as to state whether it was cultivated or not?

A. Yes, it was cultivated, sir.

Q. Do you know whether it was harvested?

A. Yes, I know it was harvested.

Q. Were you there at any time during the winter of 1892–3?

A. 1893?

358 Q. Winter of 1892–3?

A. Yes, I think I was.

Q. Did you find anybody living there then?

A. I think I went there to repair the lock on the door.

Q. Well, about 1893, were you there during the summer or spring season of 1893?

A. Yes, I was there on several occasions.

Q. Did you find anybody living there at those times?

A. I was there. I saw Mr. Jacobus there. The circumstances I just state because there may be other times I forgot; but I was there in 1893, and saw Smith planting crops. On another occasion Mrs. Jacobus and some ladies were out berrying, and another occasion went out fishing, and another occasion went out shooting.

Q. These different times during 1893?

A. Yes, different times in 1893 that I speak of.

Q. Mrs. Jacobus was there?

A. Yes, Mrs. Jacobus was there.

Q. Did you see any crop growing there in 1893? I believe you said you saw Smith planting crop there in 1893?

A. I saw Smith planting crop.

Q. Did you see it after it was planted?

A. I saw grass growing there, and the crop growing; but I only paid visits there; didn't take particular note. Same as in 1892, see something green on the ground.

359 Q. About how much clearing if any was done there in September, 1892?

A. I don't know how much was actually done in that time. There was a clearing there, fence all around. Appeared to be from an acre and a half to two acres in size, but the particular time that was actually done I don't know.

Q. I am asking you what was done, say, September 20th, 1892. I fix that date because that was the date on which he made final proof.

A. I think that clearing was all done at that time, I think. I am sure it was, because I could stand in the clearing and see the fence all around it.

Q. In 1892, were you there at any time when there was anybody at work doing underbrushing?

A. No, sir.

Q. Were you ever in the house?

A. 1893.

Q. Any of those years?

A. Oh, a great many times.

Q. State in a general way how they were fixed up in the house?

A. The house was extremely well furnished. Every convenience a person would require for living in the woods.

Cross-examination.

By Mr. SMALLWOOD:

Q. Did you say you were there fishing and hunting?

A. Yes.

Q. Was each year, you say?

A. What are you talking of, sir?

360 Q. In 1893, you said something about fishing and hunting?

A. Yes, I said I went with Mrs. Jacobus on one occasion, went fishing, and another occasion we took our guns and went hunting. I did that because that is a circumstance which convinces my mind of that particular thing.

Q. Makes you remember?

A. I may be there other times. I can't recollect.

Q. Do you know what ladies were there picking berries?

A. Yes.

Q. This was all in 1893, Mr. Lowe, wasn't it?

A. That was between the latter end of May or early in June till sometime in August.

Q. Three different times that you spoke of?

A. Yes, was in that space.

Q. How many times did you see her on the place in 1892?

A. 1892?

Q. Yes?

A. I don't know how many times I saw her. I saw her pretty often.

Q. Give us the best of your recollection, Mr. Lowe,—the different times, if it is possible.

A. Well, I couldn't say definitely. I haven't the least idea how many times, but my opinion is that I have seen her at least 20 times in that year. But, mind you, I don't say that that is a fact, because I have not the least idea. I may have seen her a great deal more or a great deal less, but my opinion is that I have seen her that many times.

361 Q. During the year?

A. During the year yes.

Q. And these times are the only times that you were there, were they? I mean, you saw her every time you were there?

A. Well, now, he may have been away sometimes. I know I saw her most of the times, anyway. I would go around, just call in by accident, to see her and visit. You know I knew she was by herself.

Q. Did you see her there in January, 1892?

A. I don't know.

Q. Did you see her in February that year?

A. Well, I can't say as to the months, nor any particular date. I couldn't specify the particular times during that year, but I know that during that year I was there often.

Q. But there is not one of those occasions that you can fix the date?

A. I can fix an occasion when I went there I had dinner. I had radishes and lettuce and potatoes, and I dug the potatoes myself. I guess half a dozen occasions that I eat there for dinner. And so those are some of the times, but what month that was in I don't know.

Q. Do you know what year?

A. I am talking of 1892. It must have been while those crops were growing that I was there on those occasions, but I was

362 there several other occasions too; but I know I didn't happen to be there meal time, and then I took nothing; then I was there on other occasions; nothing I can draw my mind on to specify.

Q. You can't think of any dates or circumstances that would enable you to fix the dates?

A. No, sir.

Q. No one?

A. No, sir.

Q. Was that your usual route during that year Mr. Lowe?

A. No, sir, that was—I called there specially as a visitor. Perhaps I would be out fishing, the fishing stream passed there; and if I had an extra supply of fish I took in a few fish; and I knew she was with the little boy by herself, and I called in to see if she wanted water carried sometimes, perhaps split a little wood for her;

just called in in a neighborly way, so that I know that I called there very often, but no ground for recollection when it was.

Q. How far is your place from the Jacobus house?

A. From the house, about ¾ of a mile.

Q. Do you know how far apart these visits would be,—more than once a week frequently?

A. Sometimes I called every day, perhaps three or four different days of the week running. Called every day perhaps. Other times perhaps would be three weeks I wouldn't call,—just as cir-
363 cumstances would be, and as I was situated myself of course. You know I would be away working sometimes.

Q. Can't you tell by reference to what you had to eat on those occasions you speak of, radishes, lettuce and potatoes, about what month in year would that be in?

A. Well, about, yes, because that was a long range. I was there and did the same several times. I was there several times to dinner, and went out and dug potatoes, and pulled vegetables. Must have been along then from the summer months. It was during the summer.

Q. 1892?

A. Yes, during the summer of 1892.

WILLIAM RUSK, being called as a witness for the defendant, was duly sworn and testified as follows:

By Mr. WHARTON:

Q. Where do you live, Mr. Rusk?

A. I live on section 5.

Q. Same town and range in which Mr. Jacobus's homestead is?

A. Yes, sir.

Q. You are acquainted with Mr. and Mrs. Jacobus?

A. Yes.

Q. How long have you known them?

A. Since '91.

Q. Since what time in 1891?

A. Well, I am acquainted with Mrs. Jacobus since along in the spring of 1891.

364 Q. How far is your place from their homestead?

A. I think to come on a straight line through it is in the neighborhood of two miles, if you come right across from my place to theirs; but sometimes we go around, it makes it a little longer. That is section 8. I am on the northeast quarter of section 5, and they are on the northwest quarter of section 17, so there would be section 8 between us.

Q. Were you on the Jacobus claim frequently during the year 1891?

A. I have been there pretty often.

Q. Did you find anybody living there?
A. Yes.
Q. Who?
A. Mrs. Jacobus.
Q. Did you see Mr. Jacobus there any during that year?
A. I seen him there, I think it was in September first. I seen him there first time. I seen Mr. Jacobus at the time he was building an addition to his house.

Mr. SMALLWOOD: Motion that all testimony in regard to 1891 be struck out as irrelevant, or taxed to the defendant.

Q. Were you there frequently in 1892?
A. Yes, sir.
Q. In 1892, you say you were there frequently. Did you find anybody living there?
A. Yes, sir.
Q. Who?
A. Mrs. Jacobus.
365 Q. Were you ever in the house?
A. Yes.
Q. Often?
A. Pretty often.
Q. In a general way, state how they were fixed for living in the house?
A. I consider that they have as nice a house to live in as there was in the country, and as well fixed. I consider that was good enough for the President to live in. That is just my opinion. It is the fixing that the "Missess" did on it.
Q. Did you see any cultivation there in 1891?
A. Yes, sir.
Q. What crops had they planted?

Objected to as irrelevant.

A. In 1891. Well in 1891 they had potatoes and vegetables.
Q. Were those crops harvested to your knowledge?
A. Yes, sir.
Q. Did they have any crop growing on the land in 1892?
A. Yes, sir.
Q. What did the crops consist of that year?
A. There was potatoes, cucumbers, turnips, cabbage, tomatoes, and all such stuff.
Q. Did you see anything in the shape of hay grown there in 1892?
A. Yes. I helped to cut some.
Q. Do you know whether the crop of 1892, the vegetable crop you speak of, was harvested?
A. Yes.
Q. Did you do any work on this place there either of these
366 years?
A. I done it. I used to come there pretty often. I took

some cabbage plants from my place, and tomatoes, and planted them for Mrs. Jacobus. And I cut some wood there one day myself, and Johnny Hill's boy. We cut some wood and carried it to the house and piled it up in the woodshed.

Q. Were you there in 1893 during the summer, summer season?

A. No, sir, I don't know anything about 1893.

Q. How much of a clearing had he there in say the fall of 1892?

A. In the neighborhood of two acres.

Q. In what manner was that cleared?

A. Well, it was cleared in pretty good shape; it was all under hay, most, and potatoes and vegetables.

Q. Did you ever count the trees left standing on that clearing?

A. No, sir, I didn't.

Q. On what part of the clearing were those trees standing?

A. Trees. Well, in fact, now I can't tell exactly what part the trees were standing. Maybe some of them all over.

Cross-examination.

By Mr. SMALLWOOD:

Q. These were small trees, were they?

A. They were pine trees.

Q. How large?

A. Oh, they would average from 15 to 16 inches through.

Q. Take the small and large together, what would be the average?

A. About 18 inches.

367 Q. Were they girded or deadened, or were they growing trees?

A. They were growing trees, pine timber.

Q. They had never been deadened or prepared for being removed, had they? They are still alive now, ain't they?

A. Still alive?

Q. Yes?

A. Well, I should judge they were. I wasn't over in the land, though.

Q. What particular times in 1892 were you there, Mr. Rusk?

A. I was there from—pretty near from the fall of 1891 to the fall of 1892, off and on, generally, because I made it a business to come from my place down there very often hunting. And coming from my place to Iron River, generally when I went from my place to Iron River I went by Mr. Jacobus's, and if I felt like being hungry I always went over there to get something to eat.

Q. Tell some of those dates when you went there to get something to eat?

A. Well, I have been there in May, 1892, and June, 1892.

Q. One time in May, you say, and one time in June?

A. I have been there several times in May, June, and along back and forth.

Q. Don't be so general. Try to be a little more specific. How many times were you there in May?

A. I might be three or four times.

Q. Well, what day of the month?

A. Oh, different. I couldn't tell exactly.

368 Q. What makes you sure of it, if you can't tell the day?

A. Because it was from the latter part of May I took cabbage plants down there.

Q. You said that. How do you come to know it was May? Because that is about the time we usually plant cabbages?

A. Plant anything in the latter part of May sometimes,—in May, latter part. It is out of the season, you know, if you let them go any longer.

Q. Plants had been growing for some time if they were ready for setting out?

A. I had plants growing myself. Mrs. McDonald, I gave her seed,—next door neighbor to me,—and she raised plants. And I had some left, more than I planted myself, and I took them down and gave them to Mrs. Jacobus; and some tomato plants.

Q. Wouldn't it naturally be later than May when tomato plants would be ready for transplanting?

A. No later, as May is the time to put any in plants. It is pretty late if you go into June.

Q. Did you have some tomato plants there?

A. Yes, I planted out cabbage plants and tomato.

Q. Did the tomatoes grow?

A. They growed. I don't know whether, now. I can't say whether they brought tomatoes on or not. I can't swear to that.

369 Q. This was in 1892?

A. 1892.

Q. This was one time in May that you took these plants down, that you can remember particularly?

A. Yes, but I have been there pretty often. I used to come down there in May and June, and all through. Used to come down there picking berries, and whenever stopped in there I always came to Mr. Jacobus's, and from there back home.

Q. Berries would be later in the season, wouldn't they, Mr. Rusk?

A. Yes, later in the season. I used to go down there to fish,—a little creek that is down there. But I very often went there, and used to take a pail and carry her some water from the spring.

Q. Do you know how many times you were there in July?

A. No, I can't exactly say the number of times.

Q. How many times do you suppose you were there during the year 1892, Mr. Rusk.

A. All together?

Q. Yes, all together.

A. Well, I might be 10 or 15 times.

Q. Did you go there in the fall after the crops were matured, his garden grown?

A. I was there back and forth till September.
Q. You wasn't there after September that year?
A. I don't think I was not there, after, much, after he proved up.
370 Q. Which was the latter part of September, wasn't it?
A. Yes, sir.
Q. Were you a witness for Mr. Jacobus at his final proof in September 1892?
A. Yes sir.
Q. In that final proof what did you put the improvements at in value?
A. That is something I couldn't exactly testify to now.
Q. What did you state to be the area of the land under cultivation?
A. Two acres.
Q. Two acres?
A. Yes.
Q. Wasn't you examined about that amount in cultivation?
A. No, I allow that it is in the neighborhood of two acres.
Q. You still think it is, do you?
A. Yes, sir.
Q. Well, is it a fact that all the clearing is in cultivation?
A. That all the clearing in cultivation?
Q. Was in cultivation that time,—was all the clearing?
A. Well, you mean how much clearing he had or how much cultivation?
Q. Cultivation?
A. I thought you meant how much clearing.
Q. How much was there in cultivation?
A. Well, I consider about between the neighborhood of a quarter of an acre and half an acre.
Q. Besides the grass?
A. Besides the grass. I thought you meant. I would consider that was cultivation too.
Mr. WHARTON: It is.
371 A. I would consider that cultivation.
Q. Did you include the grass in the cultivation?
A. I consider that cultivation.
Q. Well, then, counting the grass and garden, how much would you estimate in cultivation?
A. Well, I consider it was in the neighborhood of an acre and ½ or two acres.
Q. In cultivation?
A. Yes, counting grass and all.
Q. You so testify in your——
A. No, I didn't testify that way. I think I testified to in the neighborhood of an acre in cultivation besides clearings. I think I didn't put in the grass as cultivation, but I am saying now that I think that grass is cultivation as well as the other. When you

asked me the question, I thought you meant how much clearing he had.

Q. How much in the clearing was not in cultivation then?

A. Would be about an acre and a half. I guess that wasn't in cultivation with grass, you know.

Mr. WHARTON: He is asking you how much was not in cultivation, you know,—what he is asking you here?

A. Let me be. I will answer my own question.

By Mr. SMALLWOOD:

Q. You think an acre and a half, outside the garden?

A. Outside of the garden?

Q. That in this grass?

A. Yes.

372 Q. You don't remember what you put in at your testimony on final proof, do you?

A. I can't exactly swear now what amount I put in at, because I didn't think there would be any necessity of keeping any such track of it.

Q. Your testimony there referred to residence and cultivation from the time of his settlement, didn't it, up to the 20th of September, 1892,—it went back to his original settlement in 1892?

A. Yes, sir.

Objected to, as the proof is the best evidence.

A. I mean, the whole thing there was cleared and cultivated in 1892.

Q. How often did you see Mr. Jacobus there, Mr. Rusk, in 1892? Those visits you made?

A. Well, I see him a couple of times.

Q. And in 1891, can you remember?

A. Well, a few times. Mr. Jacobus used to come there Sunday, and I didn't used to be there on Sunday very often. Didn't travel out from home.

SAMUEL MARLETTE, being called as a witness for the defendant, being duly sworn *and* testified as follows:

By Mr. SMALLWOOD: Before this witness testifies, I would like to ask counsel to indicate what he expects to prove by him, as he has introduced an unusual number of witnesses by whom he has attempted to prove the same facts, most of which are immaterial and most of which evidence is cumulative, and we object to being

373 taxed with it, unless he indicates what new line, if any, his tactics are going to adopt.

Mr. WHARTON: I expect to prove by the witness that during a portion of the year 1892 and a portion of the year 1893 that he worked in the barber shop with Mr. Jacobus in Iron River, and

that prior to October, 1893, that Mr. and Mrs. Jacobus had no residence in the village of Iron River, to his knowledge.

Mr. SMALLWOOD: I ask that any further testimony on this point be taxed to the defendant here.

The RECEIVER: Proceed.

By Mr. WHARTON:

Q. You are acquainted with Mr. and Mrs. Jacobus, are you, Marlette?

A. Yes, sir.

Q. You may state what your occupation is.

A. Well, last few years I have worked at barbering.

Q. Where?

A. In Superior and also Iron River.

Q. Did you work any in Iron River in the season of 1892?

A. Yes, sir.

Q. From what time?

A. I think it was in July, along about the fore part of July, or last of June, until in the fall sometime.

Q. In whose shop did you work?

A. Jacobus's.

Q. You may state whether or not he was most of the time
374 at work in the shop with you?

A. Part of the time.

Q. Did you during that time know Mrs. Jacobus?

A. Yes, sir.

Q. Did you during the time that you worked in Mr. Jacobus's shop in Iron River know of them having residence in the village of Iron River?

A. No, sir.

Q. If they had had a residence there, and they been occupying it, would you have known it?

A. Yes, sir.

Q. What portion of the year of 1893, if any, did you work in the same shop with Mr. Jacobus?

A. Well, through the spring and part of the summer. I was away a good deal, off and on.

Q. During the time that you worked there in 1893 did you know of them having any residence; did they live in the village of Iron River?

A. No, sir, they didn't.

Q. If they had been living in the village of Iron River——

A. What date do you mean?

Q. Well, up to September, 1893?

A. No, sir, I didn't.

Q. If they had been living in any residence in Iron River during that period while you were there would you have known it?

A. I should think I should.

375 Q. Did he absent himself from the shop during those two years when you were there any portion of the time?
A. Yes, sir.
Q. Was that frequent or otherwise?
A. Very frequent.
Q. Do you know personally where he went to when he went away?
A. Nothing only what he told me, and the way I see him go.
Q. What direction did you see him start?
A. Used to go up north.
Q. Do you know where his homestead is?
A. Well, I have been on that section, but I never was on his place.
Q. What direction is that from Iron River?
A. It is about north. A little east of north—in a northeast direction.
Q. During the fall of 1892, do you know whether or not Mrs. Jacobus brought to the shop any potatoes?
A. Yes, she did.
Q. What was done with those potatoes?
A. They were taken into Mackmiller's shop.
Q. Have you any means of knowing how many there were?
A. Nothing, only just to guess at it, that is all.
Q. What would you guess there were of them?
A. Oh, well, there might be in the neighborhood of 6 or 7 bushel.

Cross-examination.

By Mr. SMALLWOOD:

376 Q. During 1892, from the time you commenced to work in Iron River, how often did you see Mrs. Jacobus?
A. Not very often.
Q. Then they may have been housekeeping and you not know it?
A. No, sir, they was not.
Q. How can you say, when you only saw her there at rare intervals, that they were not housekeeping there?
A. Mr. Jacobus and I generally roomed together.
Q. You roomed together, where?
A. There in Iron River.
Q. Where did they go when she came into town? Did they go off to a hotel, or did you give up your apartments, your room there?
A. She slept in the bedroom.
Q. Did you go off and leave the shop, or did you have two bedrooms?
A. In the shop?
Q. Yes.
A. Only one bedroom is all.
Q. When she was absent you occupied the same sleeping apartments with Mr. Jacobus?

A. Not all the time.
Q. You couldn't say how many times, then, you saw her there with him in 1892?
A. No, I couldn't.
Q. Nor in 1893?
A. No.
Q. And yet you know that they wasn't housekeeping?
A. Yes, I am positive they wasn't housekeeping.
Q. What makes you so positive?
A. Well, because I know that when she came into town
377 they used to go to the hotel to get their meals. I used to go with them part of the time and when he was there he used to go and get his meals.
Q. You are sure this is the year 1892 you are talking about?
A. Yes, this is 1892.
Q. What time did you say you commenced work for him in 1892?
A. Somewhere, July or last of June.
Q. Did you know of their having rooms in the old McCord block in 1892?
—. ——.
Q. Just prior to the fire?
A. No, sir.
Q. When was the new McCord block built there completed?
A. I can't tell you exactly when that was.
Q. You were there when it was built?
A. Yes, sir.
Q. Did they ever keep house in Iron River to your knowledge?
A. At any time?
Q. Yes?
A. What date do you mean?
Q. At any time, I say?
A. Yes, they are keeping house there now.
Q. When did they commence keeping house the first time in Iron River?
A. I can't tell you that.
Q. You don't know?
A. No.
Q. Then they was probably keeping house a good while before you knew anything about it, according to your admission?
A. '93, you know I was away a good deal of the time.
378 Q. How long were you away in 1893?
A. I couldn't tell you; off and on.
Q. Where were you?
A. On the homestead.
Q. You had a homestead.
A. Yes.
Q. When did you make homestead entry, Mr. Marlette?

Objected to, as immaterial and not cross-examination.

The RECEIVER: When did you make homestead entry?

A. I have not made one yet.

Q. When did you make your homestead settlement?

A. December 16th, 1889.

Q. Then, because you have not made entry, don't you think it necessary to live on the homestead,—is it that,—after settlement?

A. I have lived there pretty well; had my family there.

Q. What is the use of evading or your counsel evading me by saying you hadn't made an entry? You actually had a homestead settlement since 1889 out there, had you?

A. Yes, sir.

Q. You still claim the homestead, but haven't been able to make an entry yet?

A. No, sir.

Q. Now, during 1892, you were away at work necessarily to support your family and your improvements?

A. Yes, sir.

Q. But you went back to your homestead a good deal during that summer, didn't you?

A. In 1892?

379 Q. Yes?

A. I used to go out there sometimes once a week.

Q. How often did you say?

A. Sometimes once a week.

Q. And you would stay several days at a time, would you?

A. No, sir. I generally came back Monday.

Q. How far was the trip you had to make to your homestead,—about the same distance as his?

A. No, sir. About 16 miles.

Q. You had to go further. Well, have you been in the habit, too, of going back and forth to your homestead and your work in town as often as you could, once a week or so?

A. Yes, whenever I could.

Q. Would that be any particular time of the week?

A. Any particular time?

Q. Yes?

A. No, I don't think it would, excepting Saturdays.

Q. Would it generally be at a time when Mr. Jacobus was in the shop—wouldn't it?

A. Yes.

Q. You would hardly ever be both gone together?

A. No. Yes, on Sundays sometimes we would both be away together.

Q. You are sure they couldn't have kept house in Iron River in 1892, as I understand you?

A. Up until the date that I mentioned in the fall. I went home in the fall and was gone for some time.

380 N. H. WHARTON, being called as a witness for the defendant, was duly sworn and testified as follows:

Mr. SMALLWOOD: The witness testifying is counsel for the defendant.

Since 1891, I have been Mr. Jacobus's attorney in connection with the case of Jacobus against Hill, and since that in connection with his final proof matters, and also in the case of Hill *vs.* Jacobus,—that is this case. I think it was some time in August, 1893, I met McCord, one of the purchasers of this land, and said to him that there was an order from the Commissioner for supplemental proof on the homestead entry of Mr. Jacobus, and that we would have to call on him for a re-conveyance of the land; and while I cannot give the conversation that occurred exactly, the question of security came up, and I said to him that I would instruct Mr. Jacobus to make him a mortgage for the purchase money for the claim, if he would make a quit-claim, as I conceded that inasmuch as the Commissioner held that final receipt was prematurely issued, he couldn't make a warrantee deed. And that arrangement was made between McCord and myself in my office, and I think that it was some days afterwards, under his instructions, I had a quit-claim deed prepared and forwarded to him at Chippewa Falls, to be
381 signed by him and McLeod and their wives, and I prepared the mortgage and sent it to Mr. Jacobus to be signed, and I think made some explanation to Mr. Jacobus of why I had taken that course. I had really taken it without consulting him, as his attorney, and in that arrangemont, there is no—there was no proposition made that when the title was secured if at all there should be any reconveyance of it to Mr. McCord and McLeod. He simply took a mortgage as security for his debt, and said he would leave the question of risk for Mr. Jacobus.

Cross-examination.

By Mr. SMALLWOOD:

Q. Then as you understood it, the legal title is in Mr. Jacobus?

A. Yes, sir.

Q. The equitable title is in other parties?

A. The equitable title is in Mr. Jacobus. The other parties simply have a mortgage upon his homestead. If his homestead, title, fails their mortgage fails.

Q. But isn't there some other purchase money that was paid over that is secured in the same way that you have detailed, that goes with the land?

A. The mortgage, as I remember it now, I haven't looked at it lately to see the consideration, mortgage, I think calls for
382 $4300.

Q. (Referring to certified copy of mortgage:) You see there is a discrepancy of $50 between the mortgage and deed?

A. I have not examined the original papers, to see whether that is a true copy of the mortgage and a true deed; but I don't know how that discrepancy occurs, for the reason that the consideration as stated was $4300.

Q. Except that these certified copies you think about right?

A. Well, I would have to look them up a little bit (referring to the copies). I presume that these are copies of the original papers. I have not time just now or I could compare the originals with them. Probably will do it later on, and if there should be, find any mistakes there. Would simply state that I presume that those are copies.

Q. I will ask you if you know whether all the purchase money was paid at the time of the first sale?

A. Well, he, Mr. McCord stated at the time I had that conversation, that the purchase money had been paid. I don't think he stated when; whether it was all paid at the time of the purchase, or some of it afterwards. I don't think he made any statement as to that.

Mr. WHARTON: I desire to call attention of this office, and introduce in evidence letter "H" of the Commissioner of the General Land Office, July 26th, 1892, in which he decides the case of
383 Philip W. Jacobus *vs.* John F. Hill, involving the same land in controversy in this case, and also Commissioner's letter "H" of April 29th, 1892, in regard to the same case, closing it.

I do that for the purpose of showing that at that time it was held that his residence and settlement on the land had been made in good faith.

Objected to as irrelevant and immaterial.

Defendant rests.

Mr. SMALLWOOD: Counsel for plaintiff here moves that the testimony of the last four witnesses, before the testimony of counsel, be taxed to the defendant, as simply cumulative testimony, and also the same as to all testimony on the record relating to settlement, residence or cultivation, or to any matters which transpired prior to the homestead entry of Jacobus in July, 1892.

Motion denied. Exception.

Both parties rest.

Upon the conclusion of said hearing, and on or about the 9th day of August, 1894, the register and receiver of said land office duly made and transmitted to the Commissioner of the General Land Office the testimony so taken and received upon said contest, together with their report as required by the rules and practice
384 of the Land Department, which report is in words and figures following, to wit:

United States Land Office, Ashland, Wisconsin.

JOHN F. HILL vs. PHILIP W. JACOBUS. } Involving H. E. 3012, C. E. 5534, for Northwest Quarter of Sec. 17, Tp. 48, R. 8 West.

It appears from the records and evidence in this case that Jacobus settled on the land before the date of the Wisconsin Central opening, February 23, 1891; that his application for a homestead entry on that day was rejected because the land was covered by a soldier's declaratory statement by John F. Hill; that a hearing between the parties to determine their respective rights resulted in favor of Jacobus, and that he was allowed an entry July 6th, 1892.

September 20th, 1892, Jacobus commuted to cash entry No. 5534. The proof being premature, he was required by letter "C," May 15th, 1893, to make supplemental proof, which was offered September 20th and transmitted to the General Land Office September 22nd, 1893.

On October 6th, 1893, Hill filed an application to contest Jacobus on the ground that the entryman never settled on the land in good faith, but for the purpose of speculation; that he did not re-
385 side on the land during the six months next preceding the making of his final proof, and that he had sold the land to one W. E. McCord.

Letter "H" of November 18th, 1893, directed this office to order a hearing on the charges.

The two questions to be passed upon are:

(1.) Did Jacobus abandon the land?

(2.) Was the sale of the land to McCord and McLeod a bar to the offering of supplemental proof?

Upon the first point the testimony of the witnesses is extremely conflicting. It is admitted by Jacobus that he worked at his trade in Superior and Iron River most of the time during his occupancy of the land, but it seems also fairly well established by the testimony of Mrs. Jacobus and numerous other witnesses, and that her residence was upon the land, barring certain absences on account of sickness and visits. Their cabin and its housekeeping equipment were superior to those of most homesteaders, and the clearing, in extent and cultivation, compared favorably with that of others in the same neighborhood.

After learning that supplemental proof would probably be required, Mrs. Jacobus (p. 186) returned to the land in February, 1893, where she remained about a week, when she returned to Iron
386 River and remained for some weeks while being treated for rheumatism. She made a brief visit to the claim in March, went there again in the latter part of May, remaining two weeks, and returned for the same length of time in July. This was apparently her last stay upon the land until after supplemental proof

was offered, September 20th. A small crop of vegetables and hay was raised that season, as in the two years before.

Upon the whole, the residence of Jacobus upon the land was fairly satisfactory until after the offering of his first proof, but it is clear that his subsequent residence was for the sole purpose of enabling him to make proof in order to secure title to his transferees (pp. 161, 171).

In December, 1892, about three months after making premature proof, Jacobus sold the land to McCord and McLeod for a stated consideration of $4250.00. September 1st, 1893, the grantees named in the first instrument executed a quit-claim deed to same land to Jacobus, the expressed consideration being $4300.00.

September 12th, 1893, the day of making supplemental proof, Jacobus and wife executed a mortgage upon the land in favor of McCord and McLeod to secure a note for the amount of the stated consideration in the quit-claim deed from McCord and McLeod to Jacobus.

387 The bare statement of facts points to the conclusion that the sale of the land in December, 1892, was absolute and that the subsequent residence of Jacobus upon the land was as the agent of the transferees and for the purpose of acquiring title for them. This conclusion is strongly supported by the admissions of Jacobus upon cross-examination (pp. 168, *et seq.*).

Jacobus, by the deed executed in December, 1892, divested himself of all right and title to the land. Granting, therefore, that reconveyance September 1st, 1893, was made in good faith by all parties, the slender residence by the wife, during the spring and summer of 1893, was not upon the homestead of Jacobus, but upon the land in which he had no claim or interest, and the residence, such as it was, could not avail him in making supplemental proof. But we think all the circumstances, the time at which the conveyance from McCord and McLeod to Jacobus was made, the execution of the mortgage, and the evidence of Jacobus himself, show that the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for the benefit of his grantees. We are of the opinion, therefore, that Jacobus's supplemental proof cannot be sustained, and that the entry should be cancelled and a preference right of entry awarded the contestant, Hill.

388 Counsel for the contestant objected to admission of the testimony of the wife of the defendant, as incompetent, under the laws of Wisconsin, and since the trial have moved for a re-taxation of costs. A rigid construction of the Wisconsin statutes relating to the admission of testimony would perhaps exclude that of Mrs. Jacobus, but the exclusion of the wife's testimony in land cases would certainly be an extreme hardship in many instances, and we think the motion of contestant should be denied.

Ashland, Wisconsin, August 9th, 1894.

G. E. KUNTZ, *Register.*
CLARENCE DENNIS, *Receiver.*

Upon the consideration of such report by the Commissioner, he made his decision in respect thereto which is in words and figures following, to wit:

"A. B. W."
Doc. 6, case 8432.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, MF. OD.
J. W. W. T. W. A.
WASHINGTON, D. C., *Jan.* 23, 1895.

Address only the Commissioner of the General Land Office.

JOHN F. HILL
vs.
PHILIP W. JACOBUS.

Involving H. E. No. 3012, Made July 6, 1892, for the N. W. ¼ of Sec. 17, Tp. 48 N., R. 8, W.

Register and receiver, Ashland, Wis.

SIRS: On October 6, 1893, plaintiff filed contest affidavit,
389 alleging that said Jacobus did not settle upon or enter said land in good faith to make it his home, but for the purpose of speculation; that on September 20, 1892, defendant made final proof and commuted, and within a short time sold the timber and the land, and wholly abandoned it; that he did not reside on the land during the six months next preceding the making of his final proof, but instead lived at Iron River; that defendant testified falsely in making his final proof.

Hearing was ordered by office letter "H" of November 18, 1893, and was had with both parties present.

August 9, 1894, you found for the plaintiff and recommended the cancellation of the entry.

September 5, 1894, the defendant appealed, assigning several grounds for error; the material ones, however, are:

First. The register and receiver erred in recommending the cancellation of defendant's cash entry, when the testimony showed his full compliance —, cultivation and improvement of said land.

Second. It was error to recommend said entry for cancellation on the ground that prior to making supplemental proof in support of his homestead entry, defendant had sold said land and thereby
390 divested himself of title, where it was shown that at the time of making supplemental proof he was the owner thereof by deed from the former purchaser.

Third. Said decision, so far as it recommends the cancellation of said entry, is without cause or justification, and is contrary to and wholly unsupported by any testimony.

It appears from the records that on September 20, 1892, defendant was permitted to commute his homestead entry to cash entry No. 5534.

By letter "C" of May 15, 1893, you were directed to require Jacobus to furnish supplemental proof, as said * * * commutation was premature.

It is shown by the evidence that defendant had a small log house on the land; that it was well finished and well furnished; that he had about two acres cleared; that the improvements were worth about $200. He did not have any stock of any description, no chickens or other poultry; that on December 27, 1892, defendant sold said land to David McLeod and W. E. McCord for $4250 cash.

On the question of residence the testimony is very conflicting. Defendant's wife stayed on the land a part of the time and defendant worked in his barber shop in the town of Iron River, and stayed there nearly all the time working at his trade; he made occasional visits to the land on the Sabbath day.

391 It also appears that defendant rented three rooms in Iron River after he had sold the land, and he, with his wife, moved into them; that after defendant learned that he was required to furnish supplemental proof, because his commutation was premature, his wife moved back to the land; but defendant still remained in Iron River, making occasional visits to the land on the Sabbath and returning the same day. In reply to the question, "Why was it that after you had made proof on the land, and you believed the proof to be good, and you had sold the land, that you still continued your residence on it?" He answered, "For the reason, as I stated, that I sold this land, and if there was such a thing, * * * I wasn't going to let the men that bought it from me be loser by it. I was going to make him all right. It wouldn't be much longer, anyway, only 5 or 6 months, and we might do it and we wouldn't lose anything by it. We had nothing to lose, and he had used us well, so I thought we ought to do it. * * * That was the reason, and the only reason." Plaintiff further testified that the land was reconveyed to him for the purpose of enabling him to make the proof; that it was to enable him to acquire title to it.

392 In the case of Cann *vs.* Conner, 4 L. D. 322, it was held that, "After the submission of final proof and a hearing had thereon, additional time to show compliance with the law, though within the life of the filing, will not be granted in the presence of an adverse claim and where bad faith is evident."

The case of Alonzo W. Laird, 9 L. D. 527, is very similar to one at bar. In that case it was held that, "One who enters with no intention of establishing residence in good faith, and subsequently submits fraudulent final proofs, cannot cure the wrong and acquire title to the land by returning to the same after said proof has been rejected and his entry held for cancellation."

In the case of Dougherty, 10 L. D. 79, the request of counsel for entryman to make a new entry was denied for the reason that he cannot make a homestead entry for the benefit of another, for the entry must be for his own exclusive use and benefit.

The sale and conveyance of the land is clearly proven, and it is also clearly shown that the land was re-conveyed to defendant, so that he could submit his final supplemental proof for the benefit of

McLeod and McCord; hence your opinion is affirmed, and defendant's homestead and his cash entry for the land involved is held for cancellation.

393 You will so notify the parties in interest and defendant of his right of appeal.

Respectfully, EDW. A. BOWERS,
Ass't Commissioner.

Thereafter the said Jacobus appealed from the decision of the Commissioner to the Secretary of the Interior. Neither McCord or McLeod appealed therefrom, though they were, as claimed by themselves and Jacobus, the owners of the rights, interest and title that had accrued to the said Jacobus. The Secretary on the 26th day of April, 1896, affirmed the decision of the Commissioner in words and figures following, to wit:

DEPARTMENT OF THE INTERIOR,
F. L. C. P. J. R. P. J. R.
Vol. 22, No. 386. G. B. G. R. W. H.
WASHINGTON, *April* 28, 1896.

JOHN F. HILL
vs.
PHILIP W. JACOBUS.

The Commissioner of the General Land Office.

SIR: Philip W. Jacobus has appealed from the decision of your office, dated January 23, 1895, in the case of John F. Hill against said Jacobus, sustaining the action of the local officers in holding for cancellation his homestead entry No. 3012 and cash entry No. 5534, respectively, for the N. W. ¼ of section 17, T. 48 N., R. 8 W., Ashland land district, Wisconsin.

Said decision fairly sets forth all the facts in this case, and
394 the conclusion therein reached is sustained by the testimony and is in conformity with law and the decisions of the department, and is hereby affirmed.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

Thereupon the homestead entry and the subsequent cash entry of said Jacobus became and was cancelled and a preference right of entry granted to the contestant. Thereafter, and on or about the first day of July, 1896, the said Jacobus duly made a motion before the Secretary of the Interior for a review of said decision of April 28, 1896, and also moved that the Jacobus entry be confirmed under the provisions of the said act of Congress of June 3, 1896. No application under the provisions of said act was made to the Commissioner by the said Jacobus, nor by the said McCord and McLeod, or either of them, nor did either of said last named persons make ap-

plication under the provisions of said act to the Secretary of the Interior.

The motion to confirm was in words and figures following, to wit:

Before the Honorable Secretary of the Interior.

JOHN F. HILL
vs.
PHILIP W. JACOBUS. } Involving N. W. ¼, Sec. 17, Tp. 48 N., R. 8 W., Ashland, Wis.

395 *Statement.*

The above described land falls within the limits of the Wisconsin Central Railroad grant, which was forfeited by the act of September 29, 1890 (29 Stats. 496), the second section of which provided:

"That all persons, who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited, and are otherwise qualified on making due claims on said lands under the homestead laws within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such settlers, from the date of actual settlement or occupation."

Under the instructions from your office this land was, after due newspaper publication, opened to entry on February 23, 1891, at which time Jacobus applied to enter it under the homestead laws, alleging settlement Jan. 28, 1891.

This application was rejected by the local officers beeause one John F. Hill had, by mail, prior to nine o'clock of that day, filed a soldier's declaratory statement for the land, and Jacobus, in accordance with the instructions of the local officers, contested Hill's entry, resulting in cancellation thereof, July 6, 1892.

396 Sept. 5, 1892, Jacobus commuted his homestead entry to cash entry No. 5534, and on May 15th following, the Commissioner suspended his entry requiring him to submit supplemental proof, showing fourteen months' residence after the date of his entry July 6, 1892.

In the meantime, to wit, Dec. 27, 1892, and after the issuance of final certificate, Jacobus sold his land for a consideration of $4250.00.

After the Commissioner's order of suspension, John F. Hill, the original entryman whose entry had been cancelled, filed contest against Jacobus' entry, alleging his failure to reside upon the land fourteen months after entry and charging a sale of the same by Jacobus in violation of the law.

The Commissioner, on Nov. 18, 1893, ordered a hearing, and the case resulted in departmental decision of April 28, 1896, affirming the Commissioner's decision cancelling Jacobus' entry, on the ground that the act of March 3, 1891, required a residence of fourteen

months after entry before the same could be commuted, and that Jacobus having sold the land could not now comply with this requirement, even though the land was re-conveyed to him for that purpose.

Believing this decision to be in error, and contrary to the
397 settled doctrine of your office as announced in other cases, we respectfully move review and reconsideration thereof, and as errors assign:

1.

This case is in all respects similar to the case of Herbert H. Augusta on review (21 L. D. 200), wherein you held such entries might be equitably affirmed, and it was error in your decision of April 26, 1896, in not referring the entry of Jacobus to the "board of equitable adjudication" in accordance with the Augusta decision.

2.

The previous decision of the office in the case of Jacobus *vs.* Hill decided that Jacobus's application of Feb. 23, 1891, should have been allowed. The uniform rulings of your department and the courts are to the effect that those acts which the law contemplates should be done are to be considered as done, and that claims to your office will not be jeopardized or injured by erroneous acts of subordinate officials. It being admitted that Jacobus' application of Feb. 23, 1891, should have been allowed, he had a right to consider it as allowed, and to commute his entry under the law as it then existed within six months from Feb. 23, 1891.

3.

398 The contest of John F. Hill having been filed subsequent to the Commissioner's order of suspension, and based upon the identical grounds of suspension, should not be considered as an intervening adverse claim nor in anywise defeat the equitable consideration of Jacobus' entry.

4.

It is unnecessary to refer to the elaborate discussion and argument had before your office in the Augusta case. It is sufficient to say that the decision therein announced was supposed to be decisive of the questions involved. The present case is identical in all respects to the Augusta case, and an act of great injury and injustice would be done by not applying the Augusta decision to Jacobus' entry.

We respectfully request that this motion may be allowed, and that if any doubt exists as to the application of the Augusta decision that we may be allowed to submit argument in support of this motion.

Very respectfully, BRITTON & GRAY,

Attorneys for Philip W. Jacobus and Transferee.

DISTRICT OF COLUMBIA, } ss:
City of Washington, }

Alex. Britton being duly sworn, deposes and says that he is a member of the firm of Britton & Gray, attorneys for Philip W. Jacobus in the above entitled case; that this motion for re-
399 view is made in good faith and not for the purpose of delay.

ALEX. BRITTON.

Subscribed and sworn to before me this eighth day of June, 1896.

[SEAL.] AUGUSTUS P. SCHELL,
Notary Public.

Before the Honorable Secretary of the Interior.

JOHN F. HILL
vs.
PHILIP W. JACOBUS. } Involving N. W. ¼, Sec. 17, Tp. 48 N., R. 8. W., Ashland, Wis.

Motion to Confirm.

June 3, 1896, the President approved an act of Congress (House bill 1436), relating to commutation of homestead entries, which provides:

"That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less
400 than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs and legal representatives, as of the date of such final certificate of entry, and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman, subject to the date of such final certificate," etc.

And repealing all acts in conflict therewith, the same to take effect from and after its passage.

It will be apparent from an examination of the record that the entry of Philip W. Jacobus falls within the confirmatory provisions

of this act, and we therefore move that the entry be confirmed thereunder.

Very respectfully, BRITTON & GRAY,
Attorneys for Philip W. Jacobus and Transferee.

The decision of the Secretary of the Interior upon said motions was made the 4th day of August, 1896, and is in words and figures following, to-wit:

401 "DEPARTMENT OF THE INTERIOR,
F. L. C. C. J. G. C. J. G.
G. B. G. R. W. H.
WASHINGTON, *August* 4, 1896.

JOHN F. HILL
vs.
PHILIP W. JACOBUS. } Motion for Review.

The Commissioner of the General Land Office.

SIR: Philip W. Jacobus, through his attorneys, has filed a motion for review of department decision of April 28, 1896, wherein is affirmed the action of your office in holding for cancellation his homestead and cash entries for the N. W. ¼ of sec. 17, T. 48 N., R. 8 W., Ashland land district, Wisconsin; also a motion to confirm said entries under the provisions of the act of Congress approved June 3, 1896.

The applicant, in his motion for review, alleges that his case is in all respects similar to that of Herbert H. Augusta (on review, 21 L. D. 200), wherein it was held that a commuted homestead entry may be equitably confirmed if after its allowance the land was sold to a purchaser in good faith, and fourteen months' residence was thereby rendered impossible.

The very essence of the decision confirming the entry in that case, however, was the evidence of good faith on the part of the entryman. The evidence in the case at bar clearly shows that
402 the *entry* was not made in good faith, and the *proof* submitted by the entryman was *fraudulent*, as fully set out in your office decision of January 23, 1895.

It is likewise impossible to confirm the entry under the provisions of the act of June 3, 1896, for the same reason, namely, the *practice of fraud in making* proofs.

Both the motion for review and the motion to confirm are accordingly denied.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*"

That thereafter, and on or about the 7th day of September, 1896, the said contestant perfected his preference right of entry, and his entry was allowed on that day, and on the 28th day of November,

1896, there was issued to said Hill by the receiver and register of the land office at Ashland, aforesaid, the usual certificate of entry, and on the 12th day of January, 1897, a patent in due form of said land was duly issued to him.

The defendant further answering, alleges that on the — day of July, 1896, vol. 26 Land Decisions, 544, the Commissioner promulgated the following instructions and rule with respect to ap-
403 plications for reinstatement of entry under said act of Congress of June 6, 1896, which was approved by the Secretary of the Interior, to wit:

"Where the cash certificate in a case coming within the provisions of the statute has been cancelled, it will be necessary for the parties in interest, if they desire the reinstatement of the same and the confirmation of entry, to file in the proper land office an application for such action. You will forward the application to this office for consideration, accompanied by a full report as to the status of the tract of land embraced in the entry, the confirmation of which is desired."

The defendant further answering, alleges that the several decisions and rulings of the Commissioner of the Land Office, not herein stated to have been appealed from, *was* not appealed from, and became and are *res adjudicata* upon the several matters and questions involved, and operate to estop the plaintiff in this action from reviewing or questioning the same. That the decision of the Secretary of Interior was the determination of questions of fact, and he found and decided as facts, that the original entry of Jacobus was in bad faith and fraudulent, that his final proof, submitted to obtain commutation being the only proofs made by him before the Secretary or acted upon or considered other than those furnished
404 at the date of his entry, and being the proofs referred to by the Secretary, were false and fraudulent, and hence his decision became final and conclusive and is without the jurisdiction of the court to review, reverse or revise.

Wherefore, the defendant prays the judgment of and decree of this court that the plaintiff's action be dismissed upon the merits, and that he have and recover of the plaintiff his costs and disbursements herein.

W. F. BAILEY,
Attorney for Defendant.

STATE OF WISCONSIN, } ss:
Eau Claire County, }

W. F. Bailey, being duly sworn, deposes and says that he is the attorney for the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof and believes the same to be true. That the grounds of his belief are from a personal inspection of certified copies of the records, documents, letters, & testimony, referred to therein, from statements of the defendant, as to the material facts. That the reason why this verifica-

tion is not made by the defendant is that he is not within and does not reside within the county of Eau Claire, which is the place of residence of deponent.

W. F. BAILEY.

Subscribed and sworn to before me the 4th day of January, 1902.

FRANK R. FARR,
Notary Public, Wisconsin.

[SEAL.]

405 (Endorsed:) State of Wisconsin, Circuit court, Douglas county. Warren E. McCord, plaintiff *v.* John F. Hill, defendant. Answer. Filed April 14, 1902, Wm. H. Locke, clerk circuit court, Douglas Co., Wis. W. F. Bailey, attorney for def't, Eau Claire, Wis. Filed Nov. 29, 1902. Clarence Kellogg, clerk of supreme court, Wis.

406 STATE OF WISCONSIN:

In Circuit Court, Douglas County.

WARREN E. McCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

I, John F. Hill, the defendant in the above entitled action, hereby consent to the substitution of W. F. Bailey as attorney for defendant in the above entitled action in place of A. B. Ross, and request that all proceedings be had that may be required to constitute W. F. Bailey the attorney of record for the defendant in said action, instead of the said A. B. Ross.

JOHN F. HILL, *Defendant.*

I hereby consent to the substitution above mentioned.

A. B. ROSS.

(Endorsed:) State of Wisconsin, In circuit court, Douglas county. Warren E. McCord, pl'ff *vs.* John F. Hill, def't. Stipulation for the substitution of W. F. Bailey as attorney for the defendant. Filed June 4, 1901, Wm. H. Locke, clerk circuit court, Douglas Co., Wis. Filed Nov. 29, 1902. Clarence Kellogg, clerk of supreme court, Wis.

407 STATE OF WISCONSIN:

Circuit Court, Douglas County.

At the general term of the circuit court of Douglas county, Wis., held in the court house, in the city of Superior, county and State aforesaid, commencing on the 4th day of June, A. D. 1901, and on a day of said term, to-wit: the 4th day of June, A. D. 1901.

Present: Hon. A. J. Vinje, judge presiding.

WARREN E. McCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

The above entitled matter having come on for hearing before the court, and the court having heard the counsel, for and on behalf of defendant herein, and upon reading and filing written consent of defendant and of A. B. Ross, his attorney of record herein, that Hon. W. F. Bailey be substituted as the attorney for the defendant herein, and it appearing that sufficient reasons exist for the entry of this order,

It is hereby ordered, that W. F. Bailey be and is hereby substituted as and for the attorney for the defendant herein, A. B. Ross, the attorney of record for said defendant, having in writing consented to such substitution.

By the court:

A. J. VINJE,
Circuit Judge.

(Endorsed:) Original. Circuit court, Douglas county, Wis. Warren E. McCord, plaintiff, *vs.* John F. Hill, defendant. Order substituting W. F. Bailey as the attorney for the defendant in said action. Recorded vol. 28, p. 581. Filed June 4, 1901. Wm. H. Locke, clerk circuit court, Douglas Co., Wis. Filed Nov. 29, 1902. Clarence Kellogg, clerk of supreme court, Wis.

408 THE STATE OF WISCONSIN:

In Circuit Court for Douglas County.

WARREN E. McCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

This action having come on for trial at the regular February term of said court and the Honorable A. J. Vinje, judge of said court, having made and entered an order requesting the Honorable E. W.

Helms, judge of the eighth judicial circuit of Wisconsin, to hold court for the trial of this action, and the trial having been had before said court, the Honorable E. W. Helms presiding as judge thereof, commencing on the 29th day of April, 1902, and the court having heard the evidence and listened to arguments of counsel, makes and files its findings of fact and conclusions of law as follows:

I.

That Philip W. Jacobus was, on the 28th day of January, 1891, a natural born citizen of the United States and of the State of Wisconsin; that on said day he made actual settlement upon the
409 northwest quarter (N. W. ¼) of section seventeen (17) in township forty-eight (48) north, of range eight (8) west, in the county of Bayfield, and established an actual residence upon said lands on February 4th, 1891; that thereafter, and on February 23rd, 1891, said lands were duly opened under and by virtue of the laws of the United States for homestead settlement and entry; and that on said last named date said Jacobus duly made and presented to the land office at Ashland, Wisconsin, an application to enter said lands as a homestead. And that said lands were then subject to entry, and said application should have and would have been received and allowed by the officers of said land office, but for the fact of the improper filing of a soldier's declaratory statement thereon by the defendant John F. Hill; that said Jacobus at the time of making such application fully complied with the laws of the United States in regard to homestead entries and was entitled to have such application filed and allowed; that thereafter, and by reason of the improper receiving of said soldier's declaratory statement, and rejection of the application of said Jacobus, he, the said Jacobus, duly instituted a contest proceeding against said Hill's soldier's declaratory statement; and such proceedings were had that
410 on May 11th, 1891, and after a hearing of the parties in regular course, the register and receiver of said land office at Ashland, Wisconsin, found that said Jacobus settled upon said land prior to February 23rd, 1891, and recommended the cancellation of the soldier's declaratory statement filed by said Hill; that the defendant duly appealed to the Commissioner of the General Land Office, and thereafter proceedings were duly had and said appeal determined on April 29th, 1892, wherein and whereby it was found by the Commissioner of the General Land Office that said Jacobus settled upon said land on January 28th, 1891, and moved his family, consisting of a wife, thereon, February 4th, 1891; that his residence on said land had been continuous, though he had been absent a considerable portion of the time, laboring at his trade for the purpose of earning money to support himself and wife and improve his claim; that it was further found and determined by said Commissioner that the land was subject to entry, and that said Jacobus as a settler had a prior right to make such application and have the same allowed over that of the defendant's soldier's declaratory

statement, and that said soldier's declaratory statement should be held for cancellation; that no appeal from said decision was taken, and the same became and was a final adjudication of the rights of the
411 parties; and thereafter, and on July 6th, 1892, said soldier's declaratory statement of the defendant was cancelled and said Jacobus's homestead entry upon said land duly and regularly allowed and confirmed.

II.

That on September 20th, 1892, said Jacobus, after giving due notice of such application, duly applied to the land office at Ashland, Wisconsin, to have said homestead entry commuted to a cash entry, and that on said last named date the register and receiver of said land office allowed and permitted said Jacobus to so commute, received from him the sum of $400 in full payment of said land, and said receiver issued to him a receiver's receipt for said land, acknowledging the payment for the same, and a certificate of entry was on said day issued to him by the register of said land office, certifying that said Jacobus, in pursuance of law, did on that day purchase of said register said northwest quarter of section seventeen, at the rate of $2.50 per acre, amounting to the sum of $400, and had made full payment as required by law, and was entitled on presentation of such certificate to the Commissioner of the General Land Office to receive a patent for said land in due and regular form; that on said 20th day of September, 1892,
412 the time of the commutation of his homestead entry as above stated, said Jacobus, and also the register and receiver, and all other officers of said land office had no knowledge or information of the passage of the act of Congress of March 3rd, 1891, requiring fourteen months' residence and occupation on the lands after entry and before commutation should be made; that said Jacobus made and filed in said land office on said 20th day of September, 1892, due and regular proofs of his settlement, residence, occupation and improvements upon said land, all in due form of law; that said proofs were made and presented in good faith, were truthful in fact, and altogether free from fraud; and were made and filed in full belief that they were strictly in compliance with the law, and that the said proofs were received, accepted and allowed by the register and receiver of said land office in full belief that the same were in every way regular and proper, and that said register and receiver, in receiving, accepting and allowing said proofs, issuing the receipt and certificate of entry above mentioned thereby, and in fact found upon the proofs so made that said Jacobus had resided upon said land continuously from the 4th day of February, 1891, had cultivated and improved the same, and
413 fully complied with all the requirements of law in regard to the same as a homestead entry.

III.

That thereafter, and on or about the 27th day of December, 1892, the plaintiff, Warren E. McCord, and one Daniel McLeod purchased said land in good faith of said Jacobus, paying him therefor in cash and notes, which were afterwards fully paid, the sum of $4250, and received a warranty deed conveying to them the full title to said premises; that neither said McCord or McLeod had, prior to said purchase and conveyance, any interest in said lands, and had had no negotiations with said Jacobus more than ten days prior to the purchase and making of the said deed on said December 27th, 1892.

IV.

That on or about December 17th, 1892, and at the time that said McCord and McLeod first negotiated with said Jacobus for the purchase of said lands, and while upon said land for the purpose of estimating the value thereof, said McCord and McLeod made inquiry of the defendant John F. Hill, whether he had any claim upon said land and whether Jacobus had good title thereto; that said Hill then and there stated to said McCord and McLeod that he had been fairly beaten in his contest with Jacobus, and had no claim
414 upon said land, and that if said McCord and McLeod would buy the land he would make no claim upon it, and thereafter said defendant Hill and said McCord and McLeod duly made and signed the paper dated January 4th, 1893, and fully set out at folio — of the plaintiff's complaint; that at the time of making the supplemental proofs above mentioned the defendant well knew that said McCord and McLeod were looking at said land with a view of purchasing same from said Jacobus, and that the inquiry was made of him with reference to said purchase; that the plaintiff McCord and said McLeod did in fact rely upon the statement made by the defendant and purchased the land and paid for the same by reason of such statements.

V.

That on or about the 15th day of May, 1893, the Assistant Commissioner of the General Land Office of the United States having had his attention called to the act of March 3rd, 1891, and disregarding the rule that an entry when allowed related back to the time of settlement, by letter to the register and receiver required said Jacobus to furnish supplemental proofs showing residence and cultivation for a period of fourteen months subsequent to July 6th, 1892, together with an affidavit that he had not
415 alienated said land; that thereafter, and on or about the first day of September, 1893, the plaintiff McCord and said McLeod, together with their wives, duly executed and delivered to said Jacobus a deed of conveyance of said lands for and in consideration, as expressed therein, of the sum of $4300, and said Jacobus at the same time made and executed to said McCord and McLeod a mort-

gage upon said lands to secure the payment to them of said purchase money; that thereafter, and on or about the 12th day of September, 1893, said Jacobus made, and caused to be made and filed in the local land office at Ashland, Wisconsin, in response to the order requiring supplemental proofs, above mentioned, certain affidavits and proofs wherein and whereby it was shown that said land was conveyed to said McCord and McLeod and reconveyed as hereinbefore stated, and that said Jacobus retained two acres of said land, and shortly after the sale of said premises, and on or about February 20th, 1893, he again went upon said land with his wife, and from that time up to the time of so filing said affidavits, continued to reside upon and improve said lands; that it did not appear in said affidavits that said land was reconveyed, or that said Jacobus went back upon said lands in order to obtain the title thereto for the
416 benefit of said McCord and McLeod; that said affidavits were filed and transmitted as supplemental proofs, offered by said Jacobus, and were thereafter treated as so offered by the various officers of the department, including the register and receiver of the local land office at Ashland, the Commissioner of the General Land Office, and the Secretary of the Interior; that said defendant Hill, in entire disregard of his representations to McCord and McLeod and in violation of his agreement with them, on or about the 30th day of September, made and filed in the local land office at Ashland, contest affidavits, and also objections to the receiving of said offered supplemental proofs; that a hearing was had upon said contest and a large number of witnesses sworn; that it appears from the testimony taken on said hearing that said Jacobus resided upon said land with his wife, was there most of the time, from the time of his settlement in February, 1891, until the sale of the land to said McCord and McLeod in December, 1892; that Jacobus had no other home, though he had a barber shop at Iron River, and was necessarily absent for the purpose of earning a living for himself and wife and money with which to improve the homestead; that the improvements upon the land were of the value of $250 and more; that he raised crops of hay,
417 potatoes and other vegetables during the season of 1891 and 1892; that he fully complied with the law as to such residence, occupation and improvement of said land; that it further appeared from the testimony taken upon said hearing that the proofs made and filed by said Jacobus on September 20th, 1892, were truthful and in no manner fraudulent; that it further appeared upon said hearing by the testimony of Mr. Jacobus that the land in question was so reconveyed to him by said McCord and McLeod in September, 1893, and that he went back on said land after selling and conveying the same in December, 1892, for the purpose of acquiring the title for the benefit of said McCord and McLeod; that thereafter, and on August 9th, 1894, the register and receiver of the local land office at Ashland, Wisconsin, made and filed an opinion upon said contest, wherein they held that the residence of said Jacobus upon said land

up to the time of the sale and conveyance of the same to McCord and McLeod in December, 1892, was fairly satisfactory; that their cabin and housekeeping equipments were superior to most homesteaders, and their clearing and cultivation compared favorably with that of others in the same neighborhood, but that the residence of said Jacobus after the sale and
418 conveyance of said land to McCord and McLeod was for the sole purpose of enabling him to make proof to secure title for them, and that said land was so reconveyed to said Jacobus for the sole purpose of enabling him to make proof for the benefit of said McCord and McLeod; that upon appeal to the Commissioner of the General Land Office the opinion of the register and receiver was affirmed, under date of January 23rd, 1895, the Commissioner expressly finding that Jacobus's house was well finished and well furnished; that he had about two acres cleared, and that the improvements were worth about $200; that said Commissioner further expressly found that the reconveyance of the land by McCord and McLeod to Jacobus was made so that he could submit his final proof for their benefit; that thereafter, and on April 28th, 1896, upon appeal to the Secretary of the Interior, the decision of the register and receiver and of the Commissioner of the General Land Office, above mentioned, were duly affirmed, without restating the facts. That Congress thereafter passed the act of June 3rd, 1896, set forth in plaintiff's complaint at folio 75; that thereafter, and before the adoption of any rule of practice by the department under said act, said Jacobus made a motion before the Secretary of the Interior for a review of the
419 decision of April 28th, 1896, and also to confirm the entry under said act, said motions, and both of the same being based upon the records and files and proofs already submitted to said department; that thereupon the Secretary of the Interior made and filed his decision of August 4th, 1896, set forth at folio — of plaintiff's complaint. That it appeared from the records and files of said department and all of the proofs therein, that there was no fraud on the part of said Jacobus in the making of the proofs of September 20th, 1892; that there was fraud or attempted fraud in the supplemental proofs offered, in that it did not appear therein that the land was reconveyed by McCord and McLeod to said Jacobus for the purpose of enabling him to make proofs for their benefit, and that it did not appear therein that he went back upon the land for the purpose of making proof in their interest or for their benefit. And the court finds as a fact that the Secretary of the Interior in his decision of August 4th, 1896, referred to, in saying, "The evidence in the case at bar clearly shows that the entry was not made in good faith and the proofs submitted by the entryman was fraudulent as fully set forth in your office decision of January 23rd, 1895," referred only to the supplemental proofs
420 and the want of good faith in attempting to make the same; that said Secretary referred solely to the supplemental proofs

when he used the following language in said opinion: "It is likewise impossible to confirm the entry under the provisions of the act of June 3rd, 1896, for the same reason, namely, the practice of fraud in making proofs."

VI.

The court further finds that there was no fraud practiced by Jacobus in making the commutation proofs of September 20th, 1892, in that he then made final payment; that a final certificate of entry was then issued to him; that there were not on June 3rd, 1896, or at any time prior to the entry made by the defendant, on September 7th, 1896, any adverse claimants to the land described in the certificate so issued or of any entry whose rights originated prior to the making of such final commutation proofs; that there was, on June 3rd, 1896, at the time of the passage of said act, and now is no other reason why the title to said lands should not vest in said Jacobus as provided in said certificate of entry; that there was more than six months' actual residence in good faith by said Jacobus prior to the making of his commutation proof September 20th, 1892; that the entry of said Jacobus was not cancelled until September 10th, 1896, and that the land was not
421 re-entered by the defendant or any other person until September 7th, 1896; that a patent for said land was issued to the defendant Hill on January 12th, 1897; that on or about October 31st, 1896, said Jacobus and Lillian E. Jacobus, his wife, by a deed of conveyance in due form conveyed said land and all their interest therein to said McCord and McLeod, that thereafter, and before the commencement of this action, said McLeod duly conveyed to the plaintiff all his title and interest in said land, and that the plaintiff now owns and holds the full equitable title thereto.

VII.

The court finds that all of the facts stated in the plaintiff's complaint, not inconsistent with the facts hereinbefore specially found are true and sufficiently proven.

For its conclusions of law the court finds:

1. That the residence, occupation and improvement of the land in question by said Jacobus up to the time of the conveyance of the same in December, 1892, and all other proceedings being regular, including the commutation proofs, the issuing of the certificate of entry, the said Jacobus took and received from the Government a full and complete equitable title to the land, and only the bare legal title remained in the Government.

422 2. That the entry of said Jacobus allowed on July 6th, 1892, related back to his settlement upon the land in January, 1891, and that the commutation of his homestead entry to a cash entry on September 20th, 1892, was in all respects according to law.

3. That no supplemental proofs were necessary or required by law.

4. That the conveyance back by McCord and McLeod to Jacobus and the making or attempted making of supplemental proofs was altogether unnecessary and immaterial.

5. That under the act of June 3rd, 1896, any concealment or fraud in the supplemental proofs was altogether immaterial and of no consequence.

6. That the decision of the Secretary of the Interior in refusing to confirm the title of Jacobus under the act of Congress of June 3rd, 1896, was erroneous by reason of his mistake of law that fraud in the making of said supplemental proofs would prevent Jacobus from receiving title under that act.

7. That the defendant is estopped from making any claim or asserting any title to the land in question as against the plaintiff.

8. That the plaintiff is entitled to judgment and decree in this action adjudging that all title to the northwest quarter
423 (N.W. ¼) of section (17), in township forty-eight (48), range eight (8) west, in Bayfield county, Wisconsin, held by the defendant, or any person or persons, or corporation holding by, through or under him, be given and set over unto and declared in the plaintiff and to him, his heirs and assigns forever, and that he, and they, and each of them, be forever enjoined and restrained from claiming, asserting or setting up any right, title or interest in or to said premises or any part thereof. And further adjudged that said defendant execute and deliver to the plaintiff a deed of conveyance of said land in due form of law.

And judgment is ordered accordingly, with costs.

Dated June 28th, 1902.

By the court:

E. W. HELMS, *Judge.*

(Endorsed:) Original. The State of Wisconsin. In circuit court for Douglas county. Warren E. McCord, plaintiff *vs.* John F. Hill, defendant. Findings of fact. Sanborn, Luse, Powell & De Forest, attorneys for plaintiff, West Superior, Wisconsin. Filed June 30, 1902. Wm. H. Locke, clerk circuit court, Douglas Co. Wis. Filed Nov. 29, 1902. Clarence Kellogg, clerk of supreme court, Wis.

424 THE STATE OF WISCONSIN:

In Circuit Court for Douglas County.

At a general term of the circuit court for Douglas county, begun and held in the court-house in the city of Superior, in said county, on the first Tuesday in June, 1902, and on the 39th day of said term, to-wit, on the 10th day of July, 1902, present and presiding the Honorable E. W. Helms, of the eighth judicial circuit of said State of Wisconsin, having been called in to preside at said general term for Douglas county.

WARREN E. McCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

This case coming on for trial before the court at said term, the evidence having been taken therein and the case argued and submitted and the court having, on June 28th, 1902, made its findings of fact and conclusions of law, and the same having been filed on June 30th, 1902,—

Now, therefore, on motion of Sanborn, Luse and Powell, attorneys for the plaintiff,

It is ordered and adjudged that one Philip W. Jacobus became the owner and holder of the full equitable title in and to the northwest quarter (N. W. ¼) of section seventeen (17), in township forty-eight (48) north, of range eight (8) west, in Bayfield county, Wisconsin, on September 20th, 1892; that the plaintiff, Warren E. McCord, by purchase and by direct and mesne conveyance, afterwards became the owner and holder of such equitable title; that the defendant John F. Hill has, since the issue of the patent of the United States to him on January 12th, 1897, held the legal title to the lands above described as a trustee for the plaintiff Warren E. McCord;

425 It is further ordered and adjudged that the legal title so held by said defendant John F. Hill be and the same is hereby set over and transferred to the plaintiff, Warren E. McCord, and to his heirs and assigns forever, as of the date of said patent, above given, and that said defendant, his heirs and assigns, forever, and all persons claiming by, through or under him be barred from having or claiming any interest, either legal or equitable, in said land, and they, and each of them, are forever enjoined and restrained from setting up or claiming any right, title or interest in and to the said lands, or any part thereof, or to any interest in any timber standing or growing thereon, on January 12th, 1897, or at any time thereafter.

Further ordered and adjudged that the plaintiff have and recover of the defendant, John F. Hill, his costs and disbursements, taxed and allowed in the sum of three hundred sixty-seven (367) dollars and thirty-seven (37) cents.

Dated July 10th, 1902.

By the court,

WM. H. LOCKE, *Clerk.*

(Endorsed:) The State of Wisconsin. In circuit court for Douglas county. Warren E. McCord, plaintiff *vs.* John F. Hill, defendant. Recorded 29, p. 510. Final order and costs taxed. Sanborn, Luse & Powell, attorneys for plaintiff, West Superior, Wisconsin. Filed July 10, 1902. Wm. H. Locke, clerk circuit court, Douglas Co., Wis. Filed Nov. 29, 1902. Clarence Kellogg, clerk of supreme court, Wis.

426 STATE OF WISCONSIN:

In Circuit Court for Douglas County.

WARREN E. McCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

Bill of Exceptions.

Be it remembered, that this action being at issue, was brought on for trial at the February term of the circuit court in and for Douglas county, and on the 29th day of April, 1902, before the Hon. E. W. Helms, circuit judge, who was requested by the presiding judge of that circuit to set and try said action, Sanborn, Luse & Powell appearing as attorneys for the plaintiff and W. F. Bailey and W. H. Stafford appearing as attorneys for the defendant, whereupon the following proceedings were had:

To maintain the issue upon the part of the plaintiff, the following testimony was offered:

Mr. SANBORN, as counsel for the plaintiff: We first offer in evidence as an admission a part of the original answer in this case, that was made in 1898, in respect to the application of Mr. Jacobus to enter the land, found in folios 4, in the record here—folios 4 and 5 of the first answer, 1898, which reads as follows: "Admits that the said lands were open to entry on tne 23rd day of February, 1891,
427 and admits that on or about that time the defendant's grantor, Philip W. Jacobus, made application to enter said lands, and denies that he has any knowledge or information sufficient to form a belief as to whether or not said application so made by said Jacobus was personal or not; admits that said application of said Jacobus was rejected by the register and receiver of the local land office at Ashland, Wisconsin, upon the ground that the said lands were appropriated by soldiers' declaratory statement number 73, of the defendant." That is offered as an admission.

Mr. BAILEY: Was this at issue?

Mr. SANBORN: Yes, sir, at issue; and before that came to trial the answer was withdrawn or something—a demurrer *ore tenus* was put in by some arrangement. This answer was verified August 23, 1898. That was before the first trial. (Above statement being correct answer is omitted.)

We next offer the decision of April 29, 1892, upon the preliminary contest of Jacobus, being the same paper contained in the complaint and admitted in the answer. This is put in for the purpose of showing it was decided that Jacobus had already settled on the land in January, 1891, and that he moved on the 4th of February.

Mr. SANBORN: We next offer the commutation proofs.

428 We next offer the affidavit of William Rusk—certified copy of it, date September 20, 1892. That will be Exhibit "B." (Included in commutation proofs.) See *infra*.

Next we offer in evidence affidavit of Herbert Augusta, marked Exhibit "C." (Included in commutation proofs.) See *infra*.

Next we offer the affidavit of Philip W. Jacobus, Exhibit "D." (Included in commutation proofs.) See *infra*.

Next we offer the certificate of entry, date September 20th, 1892, marked Exhibit "E." That is when the commutation was made. (Attached.)

Next the receiver's duplicate receipt, dated the same day, marked Plaintiff's Exhibit "F." (Attached.)

Mr. SANBORN: Next we offer the deed of Jacobus and wife to McLeod and McCord, dated December 27, 1892, marked Exhibit "G." (Attached.)

We offer in evidence another admission in this answer that follows in folios 25 and 26: "This defendant had, prior to the final proof of Jacobus in making improvements upon the said lands and in pursuing his settlement rights thereon, cut about 60,000 feet of pine timber, which he had skidded and part of which he had peeled and which timber was going to waste; after the sale to
429 McCord, towit, on January 4, 1893, this defendant, desiring to remove and sell the said logs so cut by him, requested the plaintiff and said McLeod's permission to do so, which permission was granted; that at the said time this defendant signed an instrument which he was informed by the said McCord and McLeod was a gift of the said timber." (Exhibit "H.") (Said statement being correct, Exhibit "H" is omitted.)

Mr. SANBORN: I offer in evidence a part of the original deposition of Mr. McCord, taken by Mr. Ross, under statute, page 12—stipulation; it is stipulated that the relinquishment set out in the complaint is a true copy of the paper signed by the defendant. (Exhibit "I.") (The stipulation is correctly stated and refers to the signing of Exhibit "J." Exhibit "I" therefore is omitted.)

Mr. SANBORN: Now, I offer the original agreement, a relinquishment, dated January 4, 1893, signed by Daniel McLeod and W. E. McCord, and John F. Hill, being the same set out in the complaint and not admitted in the answer——

Objected to.

Duly acknowledged by him.

Objected to as incompetent, irrelevant and immaterial and improper. Objection overruled. Exception taken.

(Paper marked Exhibit) ("J.") attached.

Mr. SANBORN: Now we will offer a mortgage by Jacobus
430 and wife to W. C. Brooks, dated October 28th, 1892, for $700, duly recorded. (Exhibit "K.") Recorded December 29, 1892. Attached.

Mr. SANBORN: We offer the note accompanying that mortgage,

dated the same day, Jacobus and wife to Brooks, $700. (Marked Plaintiff's Exhibit "L.") Attached.

Next we offer a satisfaction of the same, mortgagee Brooks, W. C. Brooks to Jacobus and wife, dated April 25, 1893, recorded May 2, 1893. (Marked Plaintiff's Exhibit "M.") Attached.

We offer quit-claim deed of McLeod and wife and McCord and wife to Jacobus, dated September 1, 1893. (Marked Plaintiff's Exhibit "N.") Attached, $4300, recorded September 14, 1893.

We next offer mortgage Jacobus to McCord and McLeod, September 12, 1893, $4300, recorded September 14, 1893. (Marked Plaintiff's Exhibit "O.") Attached.

Satisfaction of the same mortgage, McLeod and McCord to Jacobus October —, 1896, unrecorded, acknowledged the 17th of October, 1896. (Marked Plaintiff's Exhibit "P.") Attached.

Quit-claim deed, Jacobus and wife to McCord and McLeod, October 31, 1896, consideration $4300; unrecorded. (Marked Plaintiff's Exhibit "Q.") Attached.

We offer deed of Daniel McLeod and wife to W. E. Mc-
431 Cord, dated March 22, 1898, recorded March 27, '98. (Marked Plaintiff's Exhibit "R.") Attached.

I offer certified copy of a tract book—land book—from the land office at Ashland, showing entries in regard to this piece of land. (Marked Plaintiff's Exhibit "S") Attached.

We offer copy of a letter from the Assistant Commissioner to the register and receiver at Ashland, dated September 10, 1896, canceling the entry of Jacobus. (Marked Plaintiff's Exhibit "T.") It relates to the date of cancelling the entry. Attached.

I now offer the minutes already marked Exhibit "E," and that can all be marked one Exhibit "U." Attached. See indorsement Ex. "E."

We now offer the supplementary proofs, consisting first of an affidavit of W. E. McCord dated September 5, 1893. (Marked Plaintiff's Exhibit "V.") Set out in full page 34 *et seq.*

Affidavit of Phillips W. Jacobus, (marked Exhibit "W"). (Set out in full page 39.) Bill of exceptions.

Affidavit of John J. Kenney; Herbert H. Augusta, dated September 12. (Marked Plaintiff's Exhibit "X.") Also attached to the same certified opinion of the register and receiver, May 14, 1891. (Marked Plaintiff's Exhibit "Y.") I offer the whole thing, endorsement and all. (Set out in full page 75.) Bill of exceptions.

432 Mr. SANBORN: That is all but the testimony, which is supposed to be the same as in the answer set out.

We offer in evidence motion to review, verified June 8, 1896, found in folios 546 to 554 inclusive, in this last answer and the motion to confirm immediately following in the answer, folios 554 to 557 inclusive, apparently without date. I will get that later.

We now offer in evidence the testimony taken upon the contest. This testimony consists of the testimony taken on the contest before

the register and receiver, from page 5 of the document offered to page 279 inclusive.

I offer certified copy (marked Plaintiff's Exhibit "Z"). (See answer fols. 74 to 520 inclusive.)

Mr. LUSE: We offer in evidence further from the defendant's answer at folios 63 to 65 inclusive, the letter ordering supplemental proofs, dated October 28, 1896,—it should be "requiring" supplemental proof. It is apparently a motion or an order. It is dated October 24, 1886, but it should be—well, it is dated at the top November 18, 1893.

Now, we offer further the opinion on the motion for review of that order, found in folios 65 to 73 inclusive, of the answer, and bearing date February 24, 1894, signed by Edwin A. Bowers, Assistant Commissioner.

433 The plaintiff, to maintain and prove the issues on his part, then called as a witness, W. E. MCCORD, who being sworn, testified:

I am the plaintiff in this action. I reside at West Superior. I have been a resident of this State forty-five years. I knew Philip W. Jacobus in his lifetime; he is not now living; about two years, I think, since his death, I have known him first at Chippewa Falls and afterwards at Iron River. I know the land described in the complaint, the northwest quarter of section 17, town 48, range 8. We bought this land of Mr. Jacobus. Mr. McLeod was with me in this, Daniel McLeod, the gentleman who is here in court. I had the first negotiations with reference to the purchase of that land with Jacobus in December, 1892, I think. I received the deed from him. (Paper shown witness.) I think that is the deed, dated December 27, 1892. I first had negotiations with Mr. Jacobus with reference to the land, I should say, perhaps a week or ten days before the date of that deed. When I had these first negotiations I had not previously been upon the land. I went upon the land, McLeod and Mr. Wiley and Mr. Campbell were with me. I know the defendant, John F. Hill, I saw him at or about the time
434 I went upon the land. He was living there at the time,—I mean this claim that I went to look at,—and these other gentlemen went with me that I have named. I saw him on the land. We took lunch at his house.

The plaintiff's counsel then asked the question:

Q. Did you have any conversation with Mr. Hill at that time with reference to whether he made any claim upon this land?

Mr. BAILEY: We object to the testimony as to any conversation with Hill as to his making any claim to the land,—first, because it is incompetent, irrelevant and immaterial, second, on the ground, it appears by the pleadings that all the agreement they had at that time was reduced to writing, signed by the parties, and hence the

writing is presumed to express the agreement and the whole of it between the parties.

Objection overruled. Exception taken.

A. Yes, sir. We asked him if he had any claim on the land, and he said no. He said he had been fairly beaten in his contest with Jacobus and made no claim to it whatever.

I had a conversation with Mr. Hill prior to that as to Mr. Jacobus desiring to sell his land. Mr. Hill called my attention to it; said that Jacobus had a good claim, and he wanted to sell it, and advised us to buy it,—I mean myself and McLeod; he knew we
435 were dealing together, at the time we were on the land and had this conversation with Mr. Hill we were estimating the land. I don't remember whether there was anything said between myself and Mr. Hill as to whether we were looking it over with the view of buying it. He knew what we were here for, of course.

The plaintiff's counsel then asked the witness the question:

Q. Was there anything said there about in any way compensating him if he would not make any claim upon the land?

Same objection. Objection overruled. Exception taken.

A. He said if we would give him some logs he had skidded up there, that he could sell down to Iron River to help him along a little, he would be perfectly satisfied—and let him live on there until the first of May. He was looking at some other place, expecting to move off at that time. I purchased the land a few days before the date of the deed. It was conveyed by the deed, Exhibit "G," which you have shown me. I paid forty-three hundred dollars for the land. I think we paid half cash and gave him notes for six months and a year for the balance. We were just starting in dealing in lands as partners together; that was the first
436 claim we brought together. Exhibit "A 1," shown me is a receipt where I paid him earnest money to bind the bargain before the papers were made out, dated December 21, 1892, and signed by Mr. Jacobus and myself.

Mr. SANBORN: I offer in evidence Plaintiff's Exhibit "A 1."

"Received of W. E. McCord the sum of $250 as part payment of the sum of $4,250, the sum agreed upon by the parties hereto as the price of the northwest quarter of section 17, town 48, range 8 west, containing one hundred and sixty acres, more or less, according to the Government survey. Balance of purchase money is to be paid in cash and notes that are acceptable as cash. Wt. D., with abstract showing good and sufficient title to said lands, is delivered to said McCord, which shall not be later than ten days from date." Signed "P. W. Jacobus." "W. E. McCord." "Signed in the presence of W. R. Hoover."

Exhibit "B 1" is the way we made the final payments when the deed was delivered, receipt signed by Mr. and Mrs. Jacobus.

Mr. LUSE: I offer it in evidence. I show you Exhibits "C 1," "D 1," "E 1," and I ask you what they are?

A. Those are the notes that we gave to Mr. Jacobus after we had taken them up and paid them. These are the notes we gave him. They were taken in these when we paid them, at the First
437 National Bank of Chippewa Falls, The stamps "Paid" were put on when we paid the notes in the bank, I imagine about the time they purport to show. I don't remember about that. They always stamp a note "paid" in the bank when it is taken up and paid.

Mr. LUSE: I offer these in evidence. These three notes are dated December 27, 1892, each of them being for $766.66. One due July 1st, after date; the next October 1st, and the next January 1st, '94. One is $766.67 instead of 66; the first bearing the stamp "Paid July 2, 1892," the second bearing stamp "Paid October 3, 1893," and the third bearing stamp, "Paid January 20, 1894." Same attached.

Those three exhibits are signed by myself and Mr. McLeod; we assumed the $700 Brooks mortgage, and afterwards paid; $250 was paid at that time. That was to bind the bargain. The $1000 mentioned in the receipt December 27th, which says, "cash when deed and abstract delivered one $1000," was paid when we got the deed.

The plaintiff's counsel then asked the witness the question:

Q. In making this purchase and in the payment of this money at the time you got the deed, and giving these notes, state whether or not you relied upon Mr. Hill's statement that he made no claim to this land?

438 Objected to for the reasons before given. Objection overruled. Exception taken.

A. We did, certainly. We would not have paid it if we had known he made any claim on it. Plaintiff's Exhibit "J" shown me is Mr. Hill's relinquishment and agreement with us that he would not make any trouble on the claim. I was present when that was signed. My signature is upon it, and also Daniel McLeod and John F. Hill's. The date is the 4th day of January, 1893. It was signed at the time that it bears date, or about that time. Mr. Hoover was present, and Percy Lyons, John Pettingill and Judge Packard, and Mr. McLeod and Mr. Hill and myself. Judge Packard is dead now. Percy Lyons, I think, is in St. Paul. Mr. Hill signed that in my presence.

Cross-examination:

At the time I made this purchase of Jacobus, and at the time I made these negotiations for the purchase, I had a little office in the

bank at Iron River. I was president of the bank of Iron River. I was interested in the water works and in buying timber there. The Water Works Company's office was not in my office. I think at that time Mr. Hoover, who was secretary of the water works, had an office in the bank; that is my remembrance of it. I am not very clear on it. My impression is, we organized the bank,
439 I should think it was in August of that same year, or along sometime not very long before that. I had a block of buildings there called the McCord block. This bank and my office was in that block. Mr. McLeod was a stockholder in the bank also. Mr. McLeod spent a portion of his time there at Iron River. He had not been doing business in Iron River very long—two or three months, I would say. We both attended to the business of the firm of McCord & McLeod in buying lands, about an equal amount, I would say. Both of us attended to purchasing. The first I knew that Jacobus had a claim there was when Hill told me. I think I knew in a general way that he was on a claim, but I didn't know where it was nor what it was. I did not know how long he had been upon the claim. I first learned that he had been upon a claim when Mr. Hill told me about it. Mr. Hill did not tell me how long he had been upon the claim. I first learned when Mr. Jacobus first went upon this claim, I think, when we were called to make settlement proof in that contest. We knew he had lived six months on the claim. He proved up when we bought it, but we didn't know what— We knew he had proved up. He had his final receipt. That is what we had for proof of residence. That is all we know per-
440 sonally. We knew probably in a general way from what people told us. I think we probably made what inquiries we could, yes, sir, and called on his wife when we went out to look over the claim. We took lunch there; that was a little over a half a mile from the Jacobus cabin, I think. I did not see Jacobus the day we went to look this land over; I didn't remember whether he knew we were going or not; we went to the Jacobus cabin. Mrs. Jacobus was there. We came over to Mr. Hill's place at lunch time. We were only upon the land a part of the day, I think. It was the next morning I made the final bargain with Mr. Jacobus and paid him $250. Mr. Jacobus and myself were present when the bargain was made. I don't think Mr. McLeod was present. I think he took the train down the night we got back from the land—in the morning, I think it was. Our memorandum of a mortgage called for the abstract. I think we got the abstract from the register of deeds' office. I don't know if any other. If we got an abstract, why, it would be from the register of deeds' office. I don't know whether I got one or not. I think we learned of the Brooks mortgage on the land from our abstract, although, of course, Mr. Jacobus told us about that before. I don't know anything about this conversation at this time. I could not say whether we have any
441 abstract that was furnished us or not. We have got an abstract. I could not tell you whether that is the abstract that

we had or not. I simply know we had the abstract we asked for. I could not tell you whether that is the only abstract we have now. We may have a dozen or two dozen. I don't know whether I have any more or not. I never looked for the papers in reference to this case. I just saw them yesterday. I am not conducting the case. I have employed my attorneys to look up the case. I guess they have looked it up all the time. I have furnished them papers, whatever was necessary, some time ago.

Q. Now, Mr. McCord, I see by this abstract it states at the heading, "Abstract of title from W. H. Hyson, Washburn, Wisconsin. The following is a correct abstract of all conveyances of record in Bayfield county on the 23rd day of December, 1892, at 5 o'clock p. m., conveying title to the following described lands, to wit: Northwest quarter, section 17, town 48, range 8 west,"

The first, "United States to Philip W. Jacobus, receipt September 20, 1892, recorded October 28, 1892." Then comes the description.

The second entry is, "P. W. Jacobus and Helena, his wife, to
442 W. E. McCord, $400, mortgage, October 8, 1892; date instrument was recorded, October 14, 1892." Giving description.

Then the third entry is, "W. E. McCord to Phillip W. Jacobus and Helena E., his wife, satisfaction of mortgage. Date November 1, 1892, recorded November 3, 1892," giving volume of record. Now, then, it seems you had some transaction with Mr. Jacobus—prior—in respect to this land, prior to December when you purchased?

A. No, sir, I did not.

I did have a mortgage, but he didn't have any money. I didn't have that mortgage of $400. I will tell you my remembrance of how I account for this mortgage being on record, how it occurred. I think Mr. Jacobus went into the bank to borrow some money, and the cashier told him he could have this money by getting an endorser. I was not present. I think Mr. Jacobus said that he could get my endorsement. That is how I was told about it afterwards, and they went up and had a mortgage drawn up, and Judge Packard, supposing the cashier would let Mr. Jacobus have the money, sent the mortgage over for record. The first I knew about it Mr. Jacobus came to me, finding fault. I had the mortgage put on record, but he never got any money of me nor I never endorsed for him. I think Judge Packard sent it to be recorded. Mr.
443 Packard was an attorney, and was a notary public. He was an attorney hired by everybody, and I got him to draw other papers. He was not particularly my agent except when I hired him to do the business of one. He was only agent when I hired him to do a particular piece of work.

My impression is that I first learned that this mortgage was recorded was when we closed up the deal, or a few days before we closed up the deal with Mr. Jacobus. He borrowed some money up here and made a mortgage, and he had to get a release of my mortgage, I think, before he could get the money on the other mortgage. It is my impression that was when I first learned of this

mortgage to you. My impression is that Mr. Jacobus and Mr. Brooks both came to me and wanted a satisfaction. I think I gave them a satisfaction. I think we went and had Judge Packard draw one up. I think Mr. Brooks came down to Iron River that time when he came to me. I think Mr. Brooks was the cashier of the bank here in Superior. I remember he came to me with Jacobus. I don't know anything about where the original satisfaction piece is. The only thing I am absolutely certain about in the whole transaction is, he never had any money of me. I could not tell you where
he got this money to pay the $400 commutation. I did not
444 learn from anybody. Never heard where he got it. I knew
him as a barber in Chippewa Falls. I think he was at Iron River as a barber. He was not in my building. He didn't have any office or any room or anything else in my building; I have seen him in my building. I never saw him in our office outside of the bank, that I remember of, in my office.

I don't believe I know Walter C. Brooks well enough to know the gentleman, but I learned yesterday that is the party—the cashier. I think he is here in town. I don't think he is cashier of the bank yet, but I saw him here in town the other day. I am not interested in the Bank of Commerce any way. I am not very sure, but I think it is the Bank of Commerce. I was not interested in that bank at that time. We assumed the mortgage when we bought the land, and I presume we had the note sent to Iron River,—the Bank of Iron River. I paid that $700 note. I don't remember now where we did pay it. We paid it when it came due, though. We didn't know what this $700 mortgage was given for. We did not know what purpose it was given for. My impression is, we first learned that the mortgage had been given to Mr. Brooks, when we got the
abstract. Mr. Jacobus may have told us about it. I don't
445 remember anything about it. My impression is that mortgage
appeared upon the abstract. It is not on the first two pages. I don't think I said I saw it on. I think I said I presumed it was on.

I could not tell you what became of the mortgage that was given by Mr. Jacobus for this $400 that was recorded. I don't think I ever saw it. I don't remember of ever seeing it at all. We paid the note in evidence given to Mr. Brooks, secured by the mortgage on this land of $700 when it came due. I don't remember the date. I think we paid it at the Bank of Iron River. I would pay my half by check, I think, either on Chippewa Falls bank or the Bank of Iron River, and leave McLeod to pay his—by check usually—by a check on Iron River. That is my best recollection, that I paid my half of it by check when it became due. I don't think I have any memoranda of that transaction in regard to the payment of this note, I don't think I have the checks which I gave. It is my habit when I pay notes to pin them on the stubs I got here in the book. I think we done that when I paid this note. That was not our note, though, you know. We could not with that note; it was not our note. We got this note when we paid it, I presume. We paid the note at

the bank. We assumed the mortgage. We got it wherever
446 it was payable. If it was payable at the Bank of Iron River, we paid it there and got it there. That bank has a stamp for showing when a note is paid. This note don't seem to have been marked paid. It bears the endorsement, "Pay to the order of the Bank of Iron River, for credit, Bank of Commerce, West Superior." Signed, "W. C. Brooks, cashier." I cannot explain why the note given by Mr. McLeod and myself, dated December 27, 1892, payable July 1, 1893, and stamped "First national bank, paid July, 1893, Chippewa Falls, Wisconsin," has all been scratched out with a pen. There is a pen-mark through there. I cannot explain it. The other two notes of this series, there is no pen-marks through the stamp in those. I don't remember now what the object was in making these notes payable at Chippewa Falls instead of at my own bank at Iron River. There was no other person interested with me besides Mr. McLeod in these lands. I gave a mortgage on these lands to Justice Marshall, I believe. I don't believe Justice Marshall is a director of the First National Bank of Chippewa Falls, and I don't think he was then,—a stockholder simply. I don't know anything about why that mortgage was withheld from record until after I got my deed. It don't seem to appear on that abstract.
447 I don't usually exact of men that I located upon homesteads $300. I didn't make any such exaction or demand of none of them. I did not make such demand of Forest Newell. I didn't swear to that. I didn't make such demand of Henry Hendricks, William Hart or Mrs. Jacobus. I had a list of what land was going to be thrown open. This man Wiley is working for me and the Wisconsin Logging & Lumber Co., in the State of Idaho; his name is John D. Wiley. I cannot tell you where he is. He is in the woods in the State of Idaho. He is working for my company in the State of Idaho now. He was working for McLeod and me in 1891 and '92. I don't remember whether we paid him by the month or by the day. I think he was working for us when we first began to buy timber at Iron River. He worked for us as long as we bought timber there. He worked for us in the summer time, estimating in the woods for us and other people, and scaling, for three or four years. He worked, I guess, for whoever he could get a chance to work for, scaling in the winter. He worked for us summer times. I think he did an occasional job for others, but he was employed by us and did our work in preference to anybody else's. We kept him busy most of the time while we had him there. We didn't have
448 anybody else in our employ that I remember of. Campbell was with us when we went out and estimated Jacobus' land. He was a logger down there. I don't think he worked for us then. I think he went out with us out of curiosity more than anything else. I don't think Campbell went with me on Miss Flannigan's place. I don't know as he estimated the Miss Flannigan logs. He cut the timber and logged it. He had it scaled. He cut those logs

for me. He was not working for me. He had a job. He had a contract for putting that in.

I know Warner S. Carr; he lives at Lake Nebagamon now, I think. I knew Mr. Packard. Mr. Jacobus did not ask me at any time to endorse a note for him. I was very well acquainted with him; saw him frequently in the barber shop at Chippewa Falls. I don't think I knew him here in Superior. I don't think I ever saw him here. I may have seen him frequently at Iron River before I made the purchase; I don't remember. I never had any business relations with him prior to this purchase. I don't know what he expected. I don't know of any reasons he would have to think that I would endorse it. The deed from Mr. Jacobus to McLeod and McCord, of date December 27, 1892, I should say was Mr.
449 Hoover's handwriting, but I am not sure of it. It is not my handwriting. The mortgage dated the 12th day of September, of Mr. Jacobus and wife to McCord and McLeod, looks to me like the handwriting of Findlay Wharton, but I could not say. I didn't notice that it was not signed by Mrs. Jacobus. There only seems to be one signature; that is Philip W. Jacobus. The notes that I gave for the purchase of this land were all made payable to the order of Mrs. Helena Jacobus. They are in my handwriting. I should say the endorsement on the back of the note, payable July 1st, 1894, "Paid 399 18-100 by Dan McLeod, July 1, 1893," was in the handwriting of Mr. Hoover, but I am not sure about that; it is not mine. I think this satisfaction of the Brooks mortgage was among our papers. We probably received that at the time we paid the note—paid the mortgage. I do not know whether I sent it over for record or not. I don't remember whether I received it after it had been entered upon the record or not, I don't remember how we got it. I don't think we paid this Brooks note of $700 until it was due, I am quite sure of that. I don't know whether it was paid before it was due or not. I don't remember anything about it, only that we assumed the mortgage when we bought the land. I was examined under the
450 statute before Mr. Perkins here one day last week. I was then asked as to this transaction, as to the consideration I paid for it, and how I paid for it. I think I answered. I don't think I said I could not remember. I think my memory of what I said was, we paid half in money and half in notes or half on time. I know that was my remembrance of it at the time. I don't think I was asked for any memoranda of the transaction. I think I was examined some time ago under section 4096 before Harry Rogers, notary public.

Q. Upon that examination before Mr. Rogers was this question asked you, "At the time you bought the claim of Jacobus, didn't he agree to make you whole if the land was lost?" And did you answer, "If he did, we should not pay any attention to it. We would not consider his agreement worth anything. We didn't

claim anything. We had the land and calculated to keep it." Did you so answer?

A. I think so.

Q. Was this question asked you, "Well, he had your money at the time, did he not?" And did you answer, "No?"

A. Well, I presume so.

Q. Was this question asked you, "You didn't buy on what Hill said? You bought on the strength of Jacobus' title?" And did you answer, "Yes, sir?"

A. I think so.

451 Redirect examination:

Mr. Sanborn has had for the past two years a large part of the papers that have been produced here on this trial, at Madison. I had not seen them since I gave them to him. I did not look them over after he came yesterday at all. I think Mr. Powell or yourself requested me to see if I could find any papers, and I found that note book, just the other day, with this memoranda in it, and the receipt which I produced. That was after I was examined by Judge Bailey. My remembrance is not very clear as to Mr. Jacobus asking me to sign a note with him or anyone else to do so for him. The rule of the bank was that when anyone wanted to borrow money he had to get an endorser or give them security. Any of the stockholders could do it—that is, could endorse; but the bank could not loan any money on a mortgage with individual names. No man could go into the bank and get money on his single endorsement, so that my remembrance would be when the cashier would ask me if I would endorse, I would tell him "Yes," if the security was sufficient, and if he told me it was I would probably endorse the note and think no more about it. My recollection is that the matter was laid before me, and I told them I would endorse, but I don't think I ever did endorse.

452 I know the money never was taken. I presume that at the time he signed the quit-claim deed, September 1, 1893, two of the notes, amounting to something over $1,500, had not been paid; probably not due. This was due January 1, 1894, and that was due October 1, 1893. I presume that when I quit-claimed back in September, I took a mortgage back, that mortgage which has been introduced here, from Mr. Jacobus, for the total amount of the purchase money. Mr. Wharton, I think, came over there and thought it was necessary to make some transfers. I was living at Chippewa Falls at that time and I was interested in the bank.

Recross-examination:

I have no knowledge or present recollection that anybody approached me and asked me to sign a note with Jacobus, or endorse a note for him at my bank at Iron River. It is a sort of impression that that is, now, it would have been done. That is the extent of my recollection about the endorsement of the note.

Redirect examination:

I have a present recollection of Mr. Jacobus coming to me about the time of the giving of the Brooks mortgage and complaining because I put that other mortgage on record.

The plaintiff, to further maintain and prove the issues on
453 his part, then called as a witness DANIEL MCLEOD, who being sworn testified:

My full name is Daniel McLeod. I live at Eau Claire. I have always been in the lumber business. I was in business with Mr. McCord, about 1892 and '93. We were buying timber together. I remember what is spoken of as the Jacobus' claim, the northwest quarter of section 17, town 48, range 8. I cannot tell the exact time I examined the timber on that land, but I think it was about the 1st of December, 1892. Mr. McCord, Mr. Campbell and Mr. Wiley were with me. Mr. Jacobus wanted to sell his claim; he spoke to me about it, and Mr. McCord and I talked it over and decided we would go down that afternoon. I think we started about ten o'clock in the day, and went down to look it over. I don't remember whether it was the same day that Mr. Jacobus spoke about selling; it was about that time. We did know he had proved up, everybody knew that, and we knew he had his final receipt. I am well acquainted with the defendant John F. Hill. I saw him when we went down to look over the land. We stopped at his house after we had looked over the timber. We had a little conversation with him in regard to that land.

The plaintiff's counsel then asked the witness the question:

Q. What did he say, if anything, relative to whether he had any claim upon the land?

454 Mr. BAILEY: We make the same objection here as made to the same question on the same subject to the witness McCord.

Objection overruled. Exception taken.

A. He said he didn't have any claim. That he was beaten fair and square. He knew we were looking it over with a view to purchase. If I remember, we did not meet Mr. Hill when we got there, but when we got through we found Mr. Hill at his house. I could not tell the exact time we purchased the land; it was shortly after that. We purchased it of Phil. Jacobus. I remember the purchase price. It was $4,250. I remember that it was paid. We paid about $2,000 in money and the balance was in three notes; Plaintiff's Exhibits "1," "D" and "E 1" are the notes that were executed. My name appears upon them as one of the signers and Mr. McCord the other. They were all paid when they came due. Each note when it came due was paid; and the other part was paid after we bought the land, when we got the deed. I remember of hearing

something about the Brooks mortgage. I think that we assumed that $700. The deed marked Plaintiff's Exhibit "G" is the deed that I received of the land in question. The Brooks mortgage was afterwards paid. I paid my part of it. I don't remember
455 much about it after that. I do not remember the details of it. In purchasing this land and paying for it we relied upon the statement made by Mr. Hill, that he had been beaten fair and square, and that he made no claim upon the land. It is my signature on Plaintiff's Exhibit "J." I remember the transaction well. The paper, Exhibit "G," was signed by Mr. John F. Hill, the defendant. I was right there in Mr. McCord's office, and Mr. McCord also signed it in my presence.

Cross-examination:

I first associated myself with Mr. McCord for the purpose of buying or dealing in timber in the fall of 1892, not very long before the purchase of this claim of Mr. Jacobus, I don't think. That was the first timber we bought. We bought some timber in Sawyer county previous to this, that is all. We got a tract in Sawyer county. That was just about the time the bank was organized that we associated ourselves together for the purpose of buying timber. Mr. McCord was the president of that bank. I had stock in the bank, and Captain Lee, De Witt Clark and Julius Ingram.

I cannot tell just exactly how much money was paid Mr. Jacobus on the delivery of this deed. I know I paid my half. I paid one thousand dollars. We paid $2,000. I paid $1,000 at the
456 time of my own money. I don't know whether I paid it in cash or by a check on the bank. I would not say. I paid $1000 at the time; it was to be a cash payment of $2,000. I think we both paid about $1,000 at that time. I would not say that was all paid at once; it was all paid within a certain time. I think the first payment that was made was $250, if I remember right. That was the first payment before the deed. And then I think when the deed was drawn we paid $1,000, if I remember right, and we assumed the debt, that $700. I paid my share of the $700 mortgage right away. I am not sure it was just then and there. It was not very long after that; I could not tell exactly. It might have been a month, it might have been more. If there is a limit it was within two months. It was not a very long time. I drew my check, I believe, on the Eau Claire national bank. I suppose it was given to Jacobus, or both checks paid right there. I cannot say positively who the owner is. I think my check was on the Eau Claire national bank. I think that would be for $500. I think my share of the Brooks mortgage was paid there in the bank. I would not say to whom it was paid. I paid it there in the bank at Iron River. I must have paid it to Mr. Hoover, the cashier. That is my recollection, that I paid it to Mr. Hoover at the bank at Iron
457 River. I think I paid it by check on the bank in Eau Claire. It might have been the Bank of Iron River. I have no mem-

oranda of this transaction. If I went to hunting up I might find something, but I didn't. I keep my stub books for awhile; after I keep them three or four years I burn them up, and my stub checks as well. I have been doing business for a great many years, and paying out a great many thousand dollars a year. I paid my half of the first note that I gave the $766 in Chippewa Falls at the First national bank. I paid it by check, check on the bank in Eau Claire. I think Mr. McCord was there when it was paid—both there at the time. I think I and McCord were both there at the time; when the second note became due and was paid, I think I paid it at Chippewa Falls. I would not say for sure whether Mr. McCord was present there, but I think he was present. His note was paid.

I don't know about the second note, whether Mr. McCord was there or not. I think the third note was paid at Chippewa Falls. I don't remember whether Mr. McCord was present when the third note was paid. I stated that everybody around Iron River knew that Jacobus had proved up. We read it in the papers. It was a common report around town that he had commuted. I understood he had commuted.

458 I was not very well acquainted with Mr. Jacobus. I used to know him years ago in Chippewa Falls. I didn't know anything about him after that, only I knew he was to Iron River. Mr. McCord did not tell me anything in respect to his financial standing or responsibility prior to making the purchase; that matter was not discussed between us at all. I did not know at the time I made that purchase that there was a mortgage upon the land, running to Warren E. McCord, of $400, or that there had been a mortgage upon the land of $400 to Warren E. McCord. I think that there was an abstract furnished, but I do not remember looking it over. We both made the negotiations for the purchase together. They were made in the Bank of Iron River. I did get the information that Jacobus wanted to sell from Jacobus himself. He spoke about it a good many times. He wanted us to go and look at the timber. I don't know how long before we entered any negotiations for the purchase of the timber he first spoke to me about selling; not very long. I should think about the time we went to look at it, about the first time I know about it, and about the first he spoke to me about it. He spoke to me several times about it. He spoke to me prior to the time we went to look at it, several times. I could not say how long. I think about

459 the first of December, about the first he talked about it. I was not there all the time. I was only up there once in a while. I knew something about that there was a mortgage upon the land running to W. C. Brooks right away, but I didn't pay much attention to it. I knew there was one. I did not know where that note and mortgage was at the time. Perhaps I did know where the note was at the time I paid my share of it. I could not say now that I did. It is a long while ago; it is ten years ago. I think that

Mr. Hoover must have held the note. I don't think I would pay unless he had it. I do not know for what purpose that note was given. I don't know anything about it. I did not make any inquiry. I do not know when it was given. I do not know whether it was given prior or subsequent to Mr. Jacobus proving up. I know this man Wiley. He used to work for me, well acquainted with him; he was employed by myself and Mr. McCord. I think we paid him so much a day for work. He was a land estimator; that was his principal business. We were engaged in estimating with a view to purchasing it. He might have worked for somebody else, but I cannot remember—don't know anything about it. Mr. Wiley was not engaged in the mercantile business while I was there. I knew at the time I had the conversation with Mr.
460 Hill what claim he referred to when he said he had been fairly beaten. He referred to the contest, I supposed—the contest between himself and Mr. Jacobus. They had a contest prior to that time. Mr. Hill told me they had a contest; he said he was fairly beaten, I am sure—Well, I guess he said, "I have been fairly beaten." To go ahead and buy this claim. "I will do you no dirt." That is the words he said, I knew he was referring to the same quarter section that Jacobus was living on, I suppose. I did not inquire very much into the character of the contest. I knew it was in the paper when he commenced his suit and got his receiver's receipt; that is all I knew about it. I didn't know that the contest I spoke of was merely a decision by the department that a man who went upon land as a settler had a preference right over the person who merely filed a soldier's declaratory statement. I knew something about the nature of the contest. I knew that Jacobus had got this receiver's receipt, and I thought the title was good, and I bought upon the strength of that knowledge. That was the inducement that induced me to purchase the land. I think Jacobus showed me his receipt, I don't remember. Mr. Hill said he gave it up. There was no contest pending at the time I purchased of Jacobus. I sold
461 out prior to the commencement of this action all my interest to McCord. I have no personal interest whatever in the result of this litigation. That sale to McCord included all of my joint holdings. The notes that were given of which I paid my share were kept there in the bank, the Bank of Iron River. I had a stock in the bank and had a box in the vault. These notes we paid Jacobus were kept in a box there in the bank after they were paid. I don't know whether this note and mortgage which we paid Brooks was kept in the box also. I think I saw three notes in the Bank of Iron River. I cannot tell when in reference to the time I paid them, how soon after. I suppose these notes were made payable to Mrs. Jacobus because she was Mr. Jacobus' wife. She lived for months on the land. I suppose that was the reason; that is all I know about it—is supposition. It is a fact that $50 additional was paid to Mrs. Jacobus. That was paid at the time the trade was made, if I remember right. I think that was paid when we made the trade. Mrs

Jacobus she got mad and said she thought she ought to get more for the land, and we agreed to give her $50, made $4300 all together. I don't think that $50 was paid until after the deed was made.

Redirect examination:

The bank there at Iron River was organized that same fall. I was one of the organizers.

462 Mr. SANBORN: We offer in evidence the affidavit of John F. Hill, made September 30, 1893—contest affidavit; affidavit of Charles Hilmer, same date and of A. B. Ross, dated October 3, 1893, (marked Plaintiff's Exhibits "F 1," "G 1" and "H 1," attached.

(*Plaintiff rests.*)

Mr. BAILEY: The defendant offers in evidence the following homestead application, No. 3012, commencing—as appears in the answer—commencing at folio 27 and extending into folio 33. That includes affidavit and the certificate of the register of the land office—including folios 27 and 28, and the homestead affidavit, which is included in folios—commencing in folio 28 and extending into folio 33.

And also homestead proof and testimony of witness, commencing in folio 33 and extending into folio 42, and homestead proof and testimony of claimant, commencing in folio 42 and extending into folio 50.

Also letter from the General Land Office, of May 15, 1893, to the register and receiver of the local land office. That is admitted by the pleadings commencing at folio 57 and extending into folio—including folio 59.

463 The next is a letter from the General Land Office of July 6, 1893, addressed to the register and receiver, commencing at folio 59 and extending into folio 61.

Then a letter from the General Land Office, dated November 18, 1893, addressed to the register and receiver of the local land office, commencing in folio 62 and extending into folio 65.

And also a decision of the General Land Office, dated February 24, 1894, commencing in folio 65 and extending to 73, which has heretofore been put in by the plaintiff.

Also certified copy of service of notice of hearing upon contest ordered upon application of John F. Hill upon Daniel McLeod and Warren E. McCord; date of service, the 24th day of February, 1894, upon McLeod, and the 24th day of February, 1894, upon McCord; and the date of the notice—of the notice which was served—is January 29, 1894, which is an order of the register and receiver, appointing the date of hearing on the 20th day of April, 1894. (Marked Defendant's Exhibit "1.")

D. McLEOD recalled for cross-examination:

Mr. STAFFORD: We offer the affidavit of F. X. Bassett, purporting to have been sworn to before Warner S. Carr, under date of September 23, 1893.

Also affidavit of Mary Bassett and Harry Beasley being
464 affidavit sworn to before Warren S. Carr, under date of September 23, 1893.

I don't know whether it is a fact or not that at the time of the purchase of the land and the claim of Jacobus that I paid at that time $1,000 myself. I could not say whether it is a fact that I didn't pay any more of that $2000, but the balance was paid by McCord, of the $2000, I don't know; I don't think that the $1000 was all paid at once. I don't remember whether I paid my part of that $2000 all at once. I would not say whether I paid $1000 and McCord had paid already $250 before the deed was given, and McCord assumed to pay that $700 mortgage. That is not my recollection of it. My recollection is that it run along, the payments run along for about a month. Paid a little at the time, if I remember right, but I think we paid $1000 at one time. We paid $500 at one time; that is my recollection, we each $500; but I am not certain. I haven't no means of finding out here. I don't know whether I have any at home. It is quite a while ago since the transaction occurred. I think my checks were mostly on the Eau Claire national bank. I might have given some on the Bank of Iron River. I am not sure. Sometimes I had an account there at that bank, not always. I tried
to keep a little account there. My impression is that I paid
465 it all within a month, I think. About the amount, I cannot tell, but I think we paid $1000 at one time. I think I paid half of that $250 that was given to bind the bargain. I could not tell you who I paid it to. I paid half the money that was paid for that claim. I don't know whether I paid half of that $250 at that time. I was present when most of the payments were made. I don't know whether I was present when that $250 was paid.

Redirect examination:

I think that stub of a note book which is shown me, to which exhibit, Plaintiff's Exhibit "C 1," corresponds, is the stub that I filled out as to that note at the time the note was given. I think that is all right. After looking at that memoranda I am not able to state positively how much of the $1000 you paid at that time and how much Mr. McCord paid. I would not want to make any statement, because I am not sure about the amount. I think that memoranda is about right. I paid $500 there, and it shows here I paid $150 and McCord $150, and I paid $500 and he paid $500. That memoranda is not in my handwriting. I think it is Mr. McCord's handwriting. I am not positive whether that was made at the time.

Mr. BAILEY: We would like to stipulate with Mr. Luse and Mr. Sanborn that either party may furnish the court with a copy
466 of the rules of practice in the General Land Office that were in force during the time of this contest.

Mr. LUSE: Which may be considered as evidence?

Mr. BAILEY: Considered as evidence, yes, sir.

Mr. LUSE: No objection.

Mr. BAILEY: With the exception of Mr. Ross, who is coming here, we will rest. He said he would be here at 2 o'clock.

Mr. SANBORN: We would like to call Mr. Brooks.

COURT: You may do so.

The plaintiff, to further maintain and prove the issues on his part, called as a witness W. C. BROOKS, who being sworn testified:

I live in Superior. I lived in this city in 1892. I knew Philip W. Jacobus. I had business with him in 1892. I recognize Plaintiff's Exhibit "L," a note dated October 27, 1892. I took that from Mr. Jacobus; I could not tell where. I think I took from Mr. Jacobus and wife, Exhibit "K," purporting to be a mortgage, dated October 28, 1892, purporting to secure a note of $700. It is given to secure that note. I don't remember this mortgage myself. The transaction took place in the Bank of Commerce, West Superior. I was connected with that bank as cashier. I paid to Mr. Jacobus that money which this note calls for. I have a check showing payment. The check is for
467 $680, dated October 31, 1892, four days after the note was given. I could not state positively why that was. My impression is this: that I took the note which had been made out on the 27th, after which I sent to Iron River and had the mortgage drawn, then brought it back to me, and I paid him the money on the note. The mortgage was drawn at Iron River. I could not state positively how that was that the check was for $680 instead of the whole amount. I think I let him have money during the time he had this land—was getting title to this land. I had been out there, and possibly he owed me this amount aside from his check for $680.

Mr. SANBORN: I offer the check in evidence. (Marked Plaintiff's Exhibit "I 1.")

I executed Plaintiff's Exhibit "M." I know by whom the $700 note was paid. I know by the endorsement it was collected by the Bank of Commerce from the Bank of Iron River. The Bank of Commerce sent it to Iron River for collection. I do not know from whom the Bank of Iron River collected it. The money represented by the note and mortgage and check were my own funds.

Cross-examination:

I severed my connection with the Bank of Commerce in 1897. I have not been engaged in the banking business since. At
468 the time this note was given times were active here at Superior. Real estate was advancing in price fairly; not quite as much as it had been previously. At this time money could be turned over frequently on short loans. I had some acquaintance with this man Jacobus. I had a slight acquaintance in Chippewa Falls before he came here, as a barber there and a barber here. I knew about his financial responsibility and standing. I cannot remember very definitely as to those things at this time. I knew what property he had in Chippewa Falls, and how he was situated here. I don't remember now of his owning any property here. I don't remember when he sold his home there in Chippewa Falls, I did not know of judgments being against him in Chippewa Falls. I never looked into his financial responsibility; I never had occasion to; I think he drew the money on that check. That was his endorsement. I didn't say that the other $20 was money I had loaned him on the outside. I said that was my impression; it is my impression that he got $680 of me on my check at that time. I don't pretend to testify from memory. Since that I found this check. I would not testify to this from memory. I don't pretend to testify to this from memory. It is not a fact that this check was given by me to him in order to make the amount appear
469 upon the books. It is for a straight loan; I think he took the money from the bank. I have no more recollection of it than that shows. It is pretty clear to me that he got the money. The stub book shows that he got the loan. The check was drawn for the loan. I might have given him a check for advances to him—have given him a check for an equal amount, then took a note had held myself. I had money of my own that I loaned, and did in this case. I loaned it at this time on six months' time and on a note and mortgage. I don't remember about the state of the title of this land. I don't think I knew there was a mortgage on record upon this land of $400 at the time. I don't remember whether Mr. Jacobus had any patent to the land. I think he had a final receipt. I think I knew it at the time. He must have had something for me to take a mortgage on. I could not state when I gave this note and mortgage over to the Bank of Commerce. I think I passed it to the Bank of Commerce from the endorsement on the note. I have not been to the Bank of Commerce since I saw you this morning. I found that check among my papers. My attention was called to the numbers of the notes, to both the discount number and also the collection number, that I could refresh my memory by. I didn't go there to the bank to find out. I knew
470 this note was sent to the Bank of Iron River. When it was sent I think it belonged to the bank from the endorsement. I think very likely I held the note for some time after I took it;

and maybe within a month or two I turned it over to the bank and endorsed it there. After I took this note and mortgage I don't remember why I didn't record the mortgage. I might have trusted Jacobus to that extent. I have been banking a great many years. I sometimes do for myself what I would not do for the bank. If I transferred this note over to the bank I think I should have put it on record. I cannot explain why I didn't put it on record until December 29th. I could not swear to whether I ever sent this mortgage to put it on record. Before I saw you these people on the other side were not with me. I was holding myself in readiness for a subpœna by you. I didn't know what my connection with the case was. I supposed it was my duty to appear here as a witness if I was wanted. I went away this morning, and was to come in obedience to a telephone message from you. The attorneys on the other side told me they would subpœna. They saw me this morning, and told me they would subpœna me if I said so. I didn't say so then, and they sent word for me. They sent word for me to come up this afternoon. I think
471 I can tell from the books of the bank at the time this note came into the hands of the bank. I think there is no doubt but what I did inquire of him, Mr. Jacobus. I think he told me there was no incumbrance, or else I would not have taken the mortgage. I don't remember whether or not I took any pains to ascertain whether or not there was anybody upon the claim besides himself that was contesting the claim or holding it against him. I supposed that he had a final receipt which I thought would be good, which I thought was sufficient. I had never been upon the land. Of my knowledge I did not know anything about its value. I could not state now who I did learn of concerning its value. I think I had made Mr. Jacobus small loans at various times. I took notes for the money I loaned him. I have not those notes. I am not in the habit of keeping cancelled notes. I would have sent the notes back. I am in the habit of keeping cancelled checks. I could not state positively about whether Mr. Jacobus got from me $400 to commute the land with. I don't remember just how long I had been acquainted with Mr. McCord. I think it was about the time he came into the Bank of Iron River. The object of sending the note to Iron River for collection was for the convenience of Mr. Jacobus. It is forty-five miles from here to Iron
472 River. My understanding is, that he lived there at that time. He was in here frequently. I saw him here. The note was payable at the Bank of Commerce. I believe I sent the note out to the Bank of Iron River for the convenience of Mr. Jacobus. I could not say whether I had any talk with Mr. McCord before I sent the note out to Iron River about the note. I have no recollection on that subject at all. If it is convenient to the party making the note and he wishes it sent to some other bank we do that. I have a recollection from the endorsement that he requested the note to be sent to the Bank of Iron River. It was undoubtedly sent there at

his request. It would be made payable to the bank we sent it to. We would endorse it over to the bank making the collection. In the endorsement on the note which said, "Pay to the order of the Bank of Iron River," that Bank of Iron River is not in my handwriting. My recollection is, that was in the handwriting of a man by the name of Johnson, who kept books there. I don't think it is in the handwriting of Mr. Hoover. I am sure it is not. I do not know Mr. Hoover's handwriting. I could not say positively about that. Johnson is dead now. I put the $28 on there. I could not say when I done it in ref-
473 erence to the time the note was made. I am in the habit of doing that before the note was due. I cannot say when I put it on; that $28 is in my handwriting. Since the first of January I have been looking after the credit department for a wholesale grocery house at West Superior.

Redirect examination:

I and Mr. Jacobus were friendly and on good terms. He quite frequently came into the bank and told me about this claim he had—come in here and told me about it; how he was getting along, what efforts he was making to have it in shape to prove up, and all about it, and I advanced him, I think, some money when we went out, on his own note; I could not say as to whether any of these notes were turned in as an offset to this check on my account at the bank. I met him perhaps two or three times a week when he was in the shop opposite the Bank of Commerce.

All the letters, documents and papers referred to and set out in defendant's answer were received in evidence, including the following:

Homestead.

Application No. 3012.

LAND OFFICE AT ASHLAND, WIS., *July* 6, 1892.

I, Phillip W. Jacobus, of Iron River, Bayfield Co., Wis., do hereby apply to enter, under section 2289, Revised Statutes of the
474 United States, the N. W. ¼ of section 17, in township 48 N., of range 8 W., containing 160 acres.

PHILLIP W. JACOBUS.

LAND OFFICE AT ASHLAND, WIS., *July* 6, 1892.

I, H. L. Besse, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same. Applicant personally known to receiver.

H. L. BESSE, *Register.*

PLAINTIFF'S EXHIBIT "D."

Homestead Affidavit.

U. S. LAND OFFICE AT ASHLAND, WIS., *July* 6, 1892.

I, Phillip W. Jacobus, of Bayfield Co., Wis., having filed my application No. 3012, for an entry under section 2289, Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am a native born citizen of the United States, and am over 21 years of age, and the head of a family; that I settled on the land applied for January 28, 1891, and established a residence thereon with my family February 4, 1891, which residence has been ever since maintained, and I have good and lasting improvements thereon: that my said
475 application is honestly and in good faith, for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, but in good faith to obtain a home for myself, and that I have not directly or indirectly made and will not make any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself; and further, that since August 30, 1890, I have not entered under the laws of the United States or filed, upon a quantity of land, agricultural in character, and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres, and that I have not heretofore made an entry under the homestead laws, and this application and affidavit is
476 made in lieu of application and affidavit dated February 23, 1891, for the same land.

PHILIP W. JACOBUS.

Sworn to and subscribed before me this 6th day of July, 1892.

H. L. BESSE, *Register.*

B. Z. C. "C." DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., *May* 15, 1893. W. O. C. J. B. W. H. W. R. K. G.

Register and receiver, Ashland, Wis.

GENTLEMEN: On July 6, 1892, Philip W. Jacobus made H. E. 3012 for the N. W. ¼ 17–48 N., 8 W., and on September 20, 1892, commuted the same to cash No. 5534.

The entry was made subsequent to the act of March 3, 1891, and falls under the requirements of the sixth section thereof, whereby parties proposing to commute their homestead entries to cash must make proof of residence on and cultivation of the land for a period of 14 months from the date of the entry.

You will require the claimant whose address is given in final proof as Iron River to furnish supplemental proof without re-publication showing residence and cultivation for a period of 14 months subsequent to July 6, 1892, the date of entry, together with non-al affidavit.

You will notify the claimant at his last known address and report promptly any action taken.

Very respectfully, EDW. A. BOWERS,
Ass't Commissioner.

477 E. Z. C. DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., *July* 6, 1893. H. W. R. K. G.

Register and receiver, Ashland, Wis.

GENTLEMEN: I have received your letter of June 20, 1893, transmitting evidence of service of notice, together with motion for review and argument filed by N. B. Wharton & Son, his attorneys in the matter of homestead entry 3012, made July 6, 1892, by Philip Jacobus for N. W. ¼, sec. 17, T. 48 N., R. 8 W., and commuted cash 5534 on September 20, 1892, which was suspended May 15, 1893, pending the making of supplemental proof showing claimant's residence on and cultivation of the land for a period of 14 months subsequent to the date of the original entry.

After careful re-examination of the case, and due consideration of the argument presented, I see no reason for receding from my decision. The statute clearly prescribes that parties proposing to commute their homestead entries to cash must show 14 months' residence and cultivation subsequent to the date of the entry. See sixth section, act of March 3, 1891, and 16 L. D., p. 285.

You will so notify the parties in interest, and that the requirements of office letter dated May 15, 1893, must be complied with.

Very respectfully, S. W. LAMOREUX,
Commissioner.

478 "H." DEPARTMENT OF THE INTERIOR, M. E. O. D.
107,519–92. GENERAL LAND OFFICE, T. W. A.
WASHINGTON, D. C., *Nov.* 18, 1893. J. W. W.

Register and receiver, Ashland, Wis.

GENTLEMEN: July 6, 1892, Philip W. Jacobus made H. E. No. 3012 for S. W. ¼ sec. 17, T. 48 N., R. 8 W., and was allowed to commute the same to C. E. No. 5534, Sept. 20, 1892.

Said commutation being premature, you were directed by my letter "C," May 15, 1893, to require supplemental proof which was forwarded by you Sept. 22, 1893.

October 19, 1893, you forwarded an application filed October 6, 1893, by John F. Hill, asking to be allowed to contest said entry.

Hill alleges in substance, by affidavits of himself and others, that the entryman never settled upon the said land in good faith to make it a home, but for the purpose of speculation, that he did not reside on the land during the six months next preceding the making of his proof, but instead lived at Iron River with his family, where he kept a barber shop, and that he has sold the land to one W. E. McCord.

I find these charges are sufficient to warrant an investigation, therefore you are directed to order a hearing thereon.

You will allow Hill thirty days to apply for notice, and pro-
479 ceed in accordance with the rules of practice. Should he fail, however, to take further action in the time allowed, you will close the case and return the contest affidavit, enclosed herewith, together with your report of proceedings had and evidence of notice as required by circular October 28, 1886, 5 L. D. 204.

Respectfully, EDW. A. BOWERS,
Ass't Commissioner.

H.
C. C. N.
107519–1893.

M. F. O. D.
T. W. A.
J. W. W.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Febr.* 24, 1894.

65470–93	104519–93	
86486–93	108799–92	6899–94
97888–93	126152–93	7292–94

JOHN F. HILL
vs.
PHILIP W. JACOBUS.

Involving Cash Entry No. 5534, Made Sept. 20, 1892, in Commutation of H. E. No. 3012, Made July 6, 1892, for N. W. ¼, Sec. 17, T. 48 N., R. 8 W.

Motion for Review.

Register and receiver, Ashland, Wis.

GENTLEMEN: December 18, 1893, counsel for Jacobus filed in this office a motion for review of office decision "H" of November 18, 1893, ordering a hearing in the above entitled case, upon the complaint of Hill, to the effect that "the entryman never settled
480 upon said land in good faith to make it a home, but for the purpose of speculation; that he did not reside on the land during the six months next preceding the making of his proof, but instead lived at Iron River with his family, where he kept a barber shop: and that he has sold the land to one W. E. McCord."

This entry was suspended, and supplemental proof called for by letter "C" of May 15, 1893, for the reason that the commutation proof was prematurely made before the expiration of 14 months from date of entry (see case of Francis A. Lockwood, 16 L. D. 285), and a motion — reconsider said action was denied by letter "C" of July 6, 1893.

Sept. 22, 1893, you forwarded the corroborated affidavit of Jacobus and McCord, filed in your office July 12, 1893, as a response to the call for supplemental proof, and you also forwarded a protest by Hill against the acceptance of such supplemental proof on the ground that Jacobus had abandoned the land; that he had never resided on the tract, and that protestant had resided continuously thereon since July 12, 1891.

On August 22, 1893, counsel for Jacobus requested that no further action be taken relative to said entry until opportunity had been afforded him to communicate with his client.

481 Oct. 19, 1893, you forwarded Hill's application to contest filed in your office October 6, 1893, and upon consideration thereof a hearing was ordered by letter "H" of November 18, 1893, referred to above, of which action counsel for both parties were advised on the same day.

The motion for review is not strictly entitled to consideration because it was not served upon plaintiff as required by rule 76 of practice until January 18, 1894, after the attention of the attorney filing said motions had been called to the defect by letter "H" of January 13, 1894, but counsel for plaintiff have waived "any question of the time within which this service was made."

Said motion is based upon a number of affidavits denying the charges in plaintiff's complaint, evidence that plaintiff relinquished his right to the land in controversy in January, 1893, and a plea that it was wrong to order a hearing without giving the entryman an opportunity to be heard after application had been made for time to confer with his client.

There is no merit in any of these contentions. It is entirely unnecessary that an entryman should be advised of an attack upon his entry prior to the time that notice of hearing is served upon him, and in this case nearly two months was allowed the defendant's counsel to "communicate with his client" after request for such indulgence was preferred.

482 As to the other grounds for the motion, it is sufficient to say that it is manifestly impossible to satisfactorily determine by means of *ex parte* affidavits the truth of the charge made, and that a plaintiff need not claim any interest in the land in controversy or even be qualified to enter. (See rule 1 practice.)

The motion is therefore denied, and you will proceed to carry out the instructions given in regard to this case in letter "H" of November 18, 1893.

Respectfully,

EDW. A. BOWERS,
Ass't Commissioner.

The testimony upon the contest appears in the answer, folios 74 to 520 inclusive, and is correctly stated therein, and instead of duplicating here, and by agreement of the parties, it may be referred to and with the same force and effect as if appearing here at length.

Before the United States Land Office, Ashland, Wisconsin.

In the Matter of the Homestead Entry No. 3012, Made July 6, 1893, by PHILIP W. JACOBUS and Commuted to Cash Entry No. 5534.

Now comes W. E. McCord, who being first duly sworn, deposes and says that sometime subsequent to the date of said commuted cash entry No. 5534 of Philip W. Jacobus, to wit, on or about

483 the 27th day of December, 1892, I and my partner, Daniel McLeod, purchased from said Jacobus the land embraced in said entry; that said land was so purchased by us in good faith, and not in accordance with any prior agreement or understanding, and that his said entry was not made on our account or in our interest, and, as I verily believe, was not made on the account or in the in-

terest of any other person or persons. I believed that said entry had been legally made, and was valid and complete, and that having submitted final proof satisfactorily to the register and receiver of the local land office and received his duplicate receipt, that the title to said land had thereby vested in said Jacobus by reason of his compliance with the provisions of the homestead law. That in making said purchase we paid therefor the full market value for said land, without any reduction for any reason whatever; and we have made to said Jacobus a reconveyance of said title to said land for the purpose of protecting the entryman and his title to said land, and not on account of any prearranged plan or agreement. That before making said purchase I was informed, and as I now believe correctly, that said Jacobus had lived on said land from about February, 1891, and was still in the full occupancy thereof at the time of said purchase; and at that time he had good, permanent
484 and lasting improvement- thereon, all of which I then believed and now believe went to his good faith as a settler on said land under the homestead law.

W. E. McCORD.

Subscribed and sworn to before me this 5th day of September, 1893.

[SEAL.] WALTER R. HOOVER,
Notary Public, Bayfield Co., Wisconsin.

United States Land Office, Ashland, Wisconsin.

In the Matter of the Homestead Entry No. 3012, Made July 6, 1892, by PHILIP W. JACOBUS and Commuted to Cash Entry No. 5234, September 5, 1892.

Now comes Philip W. Jacobus, who being sworn, deposes and says: That he is the identical Philip W. Jacobus who made the foregoing entry; that from the time he made his said commuted cash entry proof up until the middle of December, 1892, he maintained his residence thereon; that about the 27th day of December, 1892, he sold and transferred said land to Daniel McLeod and W. E. McCord; that at the time he made said sale he reserved about two acres of said land where his house and other improvements are located, which was reconveyed to him by said parties, that since the execution of this deed for said land to said parties, and very soon thereafter, he learned that other entries of a like
485 nature had been suspended and supplemental proof required showing fourteen months' residence on the land, after the allowance of the entry; that sometime about the 20th of February, 1893, fearing that such action might be taken in the case, he again went upon said land with his wife and from that time up to the present time has maintained a home on the land, although quite a

portion of that time he has necessarily been absent doing business as a barber in the village of Iron River, about six miles from said land; that he has raised, cultivated and harvested a crop on the land this season, amounting to about an acre and three-quarters; that he has never removed his household goods or effects from said land, and that they still remain thereon, and that it is still his home. And that during the present summer he has cleared preparatory to cultivation about three-quarters of an acre of said land. That said additional residence and improvements have been made in good faith, with a view to enable this affiant to make a supplemental proof, which has been required by the Commissioner of the General Land Office.

That he settled on the land in January, 1891, and made substantial improvements thereon before the same was open for entry, and that on the 23rd day of February, 1891, he applied to enter the same under the homestead law and the
486 act of May 14, 1880, alleging his settlement and residence thereon; and that said application was rejected for the reason that one John F. Hill had, on the same day, filed a soldier's declaratory statement therefor; and that he is now advised by counsel, and believes correctly advised, that said rejection was illegal, and he was not advised of a right of appeal therefrom, and that if his said entry had then been allowed the proof made and submitted at the time said entry was commuted would have shown a full compliance with the homestead law. That having, as he believed, fully complied with the provisions of the homestead law, and having submitted final proof to the satisfaction of the local office, and having received his duplicate receipt therefor, he then believed that he had a right to sell or otherwise dispose of said land, and that on or about the 27th day of September, 1892, he did sell and convey said land with the reservation as aforesaid, to the said McLeod and McCord. And that he has since, to wit, on the 5th day of September, 1893, secured from said parties a reconveyance of the title of said land to this affiant, executing to them in their behalf a mortgage upon said land to secure the purchase money therefor; that said entry was not made in the interests of said McLeod nor
487 McCord, or either of them, but was made for the sole use and benefit of this affiant; and said sale was not made for speculative purposes. And this affiant, so far as the description of the sale and re-transfer of said land is concerned, is made in lieu of final homestead affidavit—form 4—069.

PHILIP W. JACOBUS.

Subscribed and sworn to before me this 12th day of September, 1893.

G. E. KUNTZ, *Register.*

Also at the same time and place personally appeared John J. Kenney and Herbert A. Augusta, who on their oaths say, that they

have heard read the foregoing affidavit and have personal knowledge that the statements therein with reference to his said residence upon, cultivation of and improvements of said land, since submitting final proof, are true; and that from their knowledge of claimant, and association with him, for a long period of time, they have no hesitancy in saying that they believe he has acted in entire good faith in his attempt to acquire title to the land in controversy under the provisions of the homestead law; and that they have no interest, direct or indirect, in said claim.

JOHN J. KENNEY.
HERBERT H. AUGUSTA.

Subscribed and sworn to before me this 12th day of September, 1893.

G. E. KUNTZ, *Register.*

488 United States Land Office, Ashland, Wisconsin.

JOHN F. HILL *vs.* PHILIP W. JACOBUS. } Involving H. E. 3012, C. E. 5534, for Northwest Quarter of Sec. 17, Tp. 48, R. 8 West.

It appears from the records and evidence in this case that Jacobus settled on the land before the date of the Wisconsin Central opening, February 23, 1891; that his application for a homestead entry on that day was rejected because the land was covered by a soldier's declaratory statement by John F. Hill; that a hearing between the parties to determine their respective rights resulted in favor of Jacobus, and that he was allowed an entry July 6th, 1892.

September 20th, 1892, Jacobus commuted to cash entry No. 5534. The proof being premature, he was required by letter "C," May 15th, 1893, to make supplemental proof, which was offered September 20th and transmitted to the General Land Office September 22nd, 1893.

On October 6th, 1893, Hill filed an application to contest Jacobus on the ground that the entryman never settled on the land in good faith, but for the purpose of speculation; that he did not reside on the land during the six months next preceding the making of his final proof, and that he had sold the land to one W. E. McCord.

Letter "H" of November 18th, 1893, directed this office to order a hearing on the charges.

489 The two questions to be passed upon are:

(1.) Did Jacobus abandon the land?

(2.) Was the sale of the land to McCord and McLeod a bar to the offering of supplemental proof?

Upon the first point the testimony of the witnesses is extremely conflicting. It is admitted by Jacobus that he worked at his trade in Superior and Iron River most of the time during his occupancy of the land, but it seems also fairly well established by the testimony

of Mrs. Jacobus and numerous other witnesses, and that her residence was upon the land, barring certain absences on account of sickness and visits. Their cabin and its housekeeping equipment were superior to those of most homesteaders, and the clearing, in extent and cultivation, compared favorably with that of others in the same neighborhood.

After learning that supplemental proof would probably be required, Mrs. Jacobus (p. 186) returned to the land in February, 1893, where she remained about a week, when she returned to Iron River and remained for some weeks while being treated for rheumatism. She made a brief visit to the claim in March, went there again in the latter part of May, remaining two weeks, and returned
490 for the same length of time in July. This was apparently her last stay upon the land until after supplemental proof was offered, September 20th. A small crop of vegetables and hay was raised that season, as in the two years before.

Upon the whole, the residence of Jacobus upon the land was fairly satisfactory until after the offering of his first proof, but it is clear that his subsequent residence was for the sole purpose of enabling him to make proof in order to secure title to his transferees (pp. 161, 171).

In December, 1892, about three months after making premature proof, Jacobus sold the land to McCord and McLeod for a stated consideration of $4250.00. September 1st, 1893, the grantees named in the first instrument executed a quit-claim deed to same land to Jacobus, the express consideration being $4300.00.

September 12th, 1893, the day of making supplemental proof, Jacobus and wife executed a mortgage upon the land in favor of McCord and McLeod to secure a note for the amount of the stated consideration in the quit-claim deed from McCord and McLeod to Jacobus.

The bare statement of facts points to the conclusion that the sale of the land in December, 1892, was absolute and that the subsequent residence of Jacobus upon the land was as the agent of the
491 transferees and for the purpose of acquiring title for them. This conclusion is strongly supported by the admission of Jacobus upon cross-examination (p. 168, *et seq.*).

Jacobus, by the deed executed in December, 1892, divested himself of all right and title to the land. Granting, therefore, that reconveyance of September 1st, 1893, was made in good faith by all parties, the slender residence of the wife, during the spring and summer of 1893, was not upon the homestead of Jacobus, but upon land in which he had no claim or interest, and the residence, such as it was, could not avail him in making supplemental proof. But we think all the circumstances, the time at which the conveyance from McCord and McLeod to Jacobus was made, the execution of the mortgage, and the evidence of Jacobus himself, show that the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for

the benefit of his grantees. We are of the opinion, therefore, that Jacobus' supplemental proof cannot be sustained, and that the entry should be cancelled and a preference right of entry awarded to the contestant, Hill.

Counsel for the contestant objected to admission of the testimony of the wife of the defendant, as incompetent, under the laws of
492 Wisconsin, and since the trial have moved for a re-taxation of costs. A rigid construction of the Wisconsin statutes relating to the admission of testimony would perhaps exclude that of Mrs. Jacobus, but the exclusion of the wife's testimony in land cases would certainly be an extreme hardship in many instances, and we think the motion of contestant should be denied.

Ashland, Wisconsin, August 9th, 1894.

G. E. KUNTZ, *Register*.
CLARENCE DENNIS, *Receiver*.

DEPARTMENT OF THE INTERIOR,
"A. B. W." GENERAL LAND OFFICE,
Doc. 6, case 8432. MF. OD. J. W. W. T. A.
WASHINGTON, D. C., *Jan.* 23, 1895.

Address only the Commissioner of the General Land Office.

JOHN F. HILL } Involving H. E. No. 3012, Made
vs. } July 6, 1892, for the N. W. ¼ of
PHILIP W. JACOBUS. } Sec. 17, Tp. 48 N., R. 8 W.

Register and receiver, Ashland, Wis.

SIR-: On October 6, 1893, plaintiff filed contest affidavit, alleging that said Jacobus did not settle upon or enter said land in good faith to make it his home, but for the purpose of speculation; that on September 20, 1892, defendant made final proof and commuted, and within a short time sold the timber and the land, and
493 wholly abandoned it; that he did not reside on the land during the six months next preceding the making of his final proof, but instead lived at Iron River; that defendant testified falsely in making his final proof.

Hearing was ordered by office letter "H" of November 18, 1893, and was had with both parties present.

August 9, 1894, you found for the plaintiff and recommended the cancellation of the entry.

September 5, 1894, the defendant appealed, assigning several grounds for error; the material ones, however, are:

First. The register and receiver erred in recommending the cancellation of defendant's cash entry, when the testimony showed his full compliance —, cultivation and improvement of said land.

Second. It was error to recommend said entry for cancellation on the ground that prior to making supplemental proof in support of

his homestead entry, defendant had sold said land and thereby divested himself of title, where it was shown at the time of making supplemental proof he was the owner thereof by deed from the former purchaser.

Third. Said decision, so far as it recommends the cancellation of said entry, is without cause or justification, and is contrary to and wholly unsupported by any testimony.

494 It appears from the records that on September 20, 1892, defendant was permitted to commute his homestead entry to cash entry No. 5534.

By letter "C" of May 15, 1893, you were directed to require Jacobus to furnish supplemental proof, as said * * * commutation was premature.

It is shown by the evidence that defendant had a small log house on the land; that it was well finished and well furnished; that he had about two acres cleared; that the improvements were worth about $200. He did not have any stock of any description, no chickens or other poultry; that on December 27, 1892, defendant sold said land to David McLeod and W. E. McCord for $4,250 cash.

On the question of residence the testimony is very conflicting.

Defendant's wife stayed on the land a part of the time and defendant worked in his barber shop in the town of Iron River, and stayed there nearly all the time working at his trade; he made occasional visits to the land on the Sabbath day.

It also appears that defendant rented three rooms in Iron River after he had sold the land, and he, with his wife, moved into
495 them; that after defendant learned that he was required to furnish supplemental proof, because his commutation was premature, his wife moved back to the land; but defendant still remained in Iron River, making occasional visits to the land on the Sabbath and returning the same day. In reply to the question, "Why was it that after you had made proof on the land, and you believed the proof to be good, and you had sold the land, that you still continued your residence on it?" He answered, "For the reason, as I stated, that I sold this land, and if there was such a thing, * * * I wasn't going to let the men that bought it from me be loser by it. I was going to make him all right. It wouldn't be much longer, anyway, only 5 or 6 months, and we might do it and we wouldn't lose anything by it. We had nothing to lose, and he had used us well, so I thought we ought to do it. * * * That was the reason, and the only reason." Plaintiff further testified that the land was reconveyed to him for the purpose of enabling him to make the proof, that it was to enable him to acquire title to it.

In the case of Cann *vs.* Conner, 4 L. D. 322, it was held that, "after the submission of final proof and a hearing had thereon, additional time to show compliance with the law, though within the life of the filing, will not be granted in the presence of an adverse claim and where bad faith is evident."

496 The case of Alonzo W. Laird, 9 L. D. 527, is very similar to the one at bar. In that case it was held that, "one who enters with no intention of establishing residence in good faith, and subsequently submits fraudulent final proofs, cannot secure the wrong and acquire title to land by returning to the same after said proof has been rejected and his entry held for cancellation."

In the case of Dougherty, 10 L. D. 79, the request of counsel for entryman to make a new entry was denied for the reason that he cannot make a homestead entry for the benefit of another, for the entry must be for his own exclusive use and benefit.

The sale and conveyance of the land is clearly proven, and it is also clearly shown that the land was reconveyed to defendant, so that he could submit his final supplemental proof for the benefit of McLeod and McCord; hence your opinion is affirmed, and defendant's homestead and his cash entry for the land involved is held for cancellation.

You will so notify the parties in interest and defendant of his right of appeal.

Respectfully, EDW. A. BOWERS,
Ass't Commissioner.

497 DEPARTMENT OF THE INTERIOR,
F. L. C. P. J. R. P. J. R.
Vol. 22, No. 386. G. B. G. R. W. H.
WASHINGTON, *April* 28, 1896.

JOHN F. HILL
vs.
PHILIP W. JACOBUS.

The Commissioner of the General Land Office.

SIR: Philip W. Jacobus has appealed from the decision of your office, dated January 23, 1895, in the case of John F. Hill against said Jacobus, sustaining the action of the local officers in holding for cancellation his homestead entry No. 3012 and cash entry No. 5534, respectively, for the N. W. ¼ of section 17, T. 48 N., R. 8 W., Ashland land district, Wisconsin.

Said decision fairly sets forth all the facts in this case, and the conclusion therein reached is sustained by the testimony and is in conformity with law and the decisions of the department, and is hereby affirmed.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

Before the Honorable Secretary of the Interior.

JOHN F. HILL
vs.
PHILIP W. JACOBUS. } Involving N. W. ¼, Sec. 17, Tp. 48 N., R. 8 W., Ashland, Wis.

Statement.

The above described land falls within the limits of the Wis-
498 consin Central Railroad grant, which was forfeited by the act of September 29, 1890 (29 Stats. 496), the second section of which provided:

"That all persons who at the date of the passage of this act are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified on making due claims on said lands under the homestead laws within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such settlers from the date of actual settlement or occupation."

Under the instructions of your office this land was, after due newspaper publication, opened to entry on February 23, 1891, at which time Jacobus applied to enter it under the homestead laws, alleging settlement Jan. 28, 1891.

This application was rejected by the local officers because one John F. Hill had by mail prior to nine o'clock of that day filed a soldier's declaratory statement for the land and Jacobus in accordance with the instructions of the local land officers, contested Hill's entry, resulting in cancellation thereof, July 6, 1892.

Sept. 5, 1892, Jacobus commuted his homestead entry to cash entry
No. 5534, and on May 15th following, the Commissioner sus-
499 pended his entry requiring him to submit supplemental proof, showing fourteen months' residence after the date of his entry July 6, 1892.

In the meantime, to wit, Dec. 27, 1892, and after the issuance of final certificate, Jacobus sold his land for a consideration of $4250.00.

After the Commissioner's order of suspension, John F. Hill, the original entryman whose entry had been cancelled, filed contest against Jacobus' entry, alleging his failure to reside upon the land fourteen months after entry and charging a sale of the same by Jacobus in violation of the law.

The Commissioner, on Nov. 18, 1893, ordered a hearing, and the case resulted in departmental decision of April 28, 1896, affirming the Commissioner's decision cancelling Jacobus' entry, on the ground that the act of March 3, 1891, required a residence of fourteen months after entry before the same could be commuted, and that Jacobus having sold the land could not now comply with this requirement, even though the land was re-conveyed to him for that purpose.

Believing this decision to be in error and contrary to the settled doctrine of your office as announced in other cases, we respectfully move review and reconsideration thereof, and as errors assign:

500 1.

This case is in all respects similar to the case of Herbert H. Augusta on review (21 L. D. 200), wherein you held such entries might be equitably affirmed, and it was error in your decision of April 26, 1896, in not referring the entry of Jacobus to the "board of equitable adjudication" in accordance with the Augusta decisions.

2.

The previous decision of the office in the case of Jacobus vs. Hill decided that Jacobus' application of Feb. 23, 1891, should have been allowed. The uniform rulings of your department and the courts are to the effect that those acts which the law contemplates should be done are to be considered as done, and that claims to your office will not be jeopardized or injured by erroneous acts of subordinate officials. It being admitted that Jacobus' application of Feb. 23, 1891, should have been allowed, he had a right to consider it as allowed, and commute his entry under the law as it then existed within six months from Feb. 23, 1891.

3.

The contest of John F. Hill having been filed subsequent to the Commissioner's order of suspension, and based upon the identical grounds of suspension, should not be considered as an inter-
501 vening adverse claim nor in anywise defeat the equitable consideration of Jacobus' entry.

4.

It is unnecessary to refer to the elaborate discussion and argument had before your office in the Augusta case. It is sufficient to say that the decision therein announced was supposed to be decisive of the question involved. The present case is identical in all respects to the Augusta case, and an act of great injury and injustice would be done by not applying the Augusta decision to Jacobus' entry.

We respectfully request that this motion may be allowed, and that if any doubt exists as to the application of the Augusta decision that we may be allowed to submit argument in support of this motion.

Very respectfully, BRITTON & GRAY,
Attorneys for Philip W. Jacobus and Transferee.

DISTRICT OF COLUMBIA, } ss:
City of Washington, }

Alex. Britton being duly sworn, deposes and says that he is a member of the firm of Britton & Gray, attorneys for Philip W. Jacobus in the above entitled case; that this motion for review is made in good faith and not for the purpose of delay.

ALEX. BRITTON.

502 Subscribed and sworn to before me this eighth day of June, 1896.

[SEAL.] AUGUSTUS P. SCHELL,
Notary Public.

Before the Honorable Secretary of the Interior.

JOHN F. HILL } Involving N. W. ¼, Sec. 17, Tp. 48 N.,
vs. R. 8. W., Ashland, Wis.
PHILIP W. JACOBUS. }

Motion to Confirm.

June 3, 1896, the President approved an act of Congress (House bill 1436), relating to commutation of homestead entries, which provides:

"That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by
503 the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs and legal representatives, as of the date of such final certificates of entry, and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman, subject to the date of such final certificate," etc.

And repealing all acts in conflict therewith, the same to take effect from and after its passage.

It will be apparent from an examination of the record that the entry of Philip W. Jacobus falls within the confirmatory provisions

of this act, and we, therefore, move that the entry be confirmed thereunder.

Very respectfully, BRITTON & GRAY,
Attorneys for Philip W. Jacobus and Transferee.

DEPARTMENT OF THE INTERIOR,
F. L. C. C. J. G. G. J. G.
G. B. G. R. W. H.
WASHINGTON, *August* 4, 1896.

JOHN F. HILL
vs.
PHILIP W. JACOBUS. } Motion for Review.

The Commissioner of the General Land Office.

504 SIR: Philip W. Jacobus, through his attorneys, has filed a motion for review of department decision of April 28, 1896, wherein is affirmed the action of your office in holding for cancellation his homestead and cash entries for the N. W. ¼ of sec. 17, T. 48 N., R. 8 W., Ashland land district, Wisconsin; also a motion to confirm said entries under the provisions of the act of Congress approved June 3, 1896.

The applicant, in his motion for review, alleges that his case is in all respects similar to that of Herbert H. Augusta (on review, 21 L. D. 200), wherein it was held that a commuted homestead entry may be equitably confirmed if after its allowance the land was sold to a purchaser in good faith, and fourteen months' residence was thereby rendered impossible.

The very essence of the decision confirming the entry in that case, however, was the evidence of good faith on the part of the entryman. The evidence in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent, as fully set out in your office decision of January 23, 1895.

It is likewise impossible to confirm the entry under the provisions of the act of June 3, 1896, for the same reason, namely, the practice of fraud in making proofs.

505 Both the motion for review and the motion to confirm are accordingly denied.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

Vol. 26, Land Decisions, 544, the Commissioner promulgated the following instructions and rule with respect to application for reinstatement of entry under said act of Congress of June 6, 1896, which was approved by the Secretary of the Interior, to wit:

Where the cash certificate in a case coming within the provisions of the statute has been cancelled, it will be necessary for the par-

ties in interest, if they desire the reinstatement of the same and the confirmation of entry, to file in the proper land office an application for such action. You will forward the application to this office for consideration, accompanied by a full report as to the status of the tract of land embraced in the entry, the confirmation of which is desired."

Rules of the Land Department as follows:

Rules 51, 52 and 53 of the revised edition, July 15, 1901.

Rule 51. Upon the termination of a contest the register and receiver will render a joint report and opinion in the case,
506 making full and specific reference to the postings and annotations upon their records.

Rule 52. The register and receiver will promptly forward their report, together with the testimony and all the papers in the case, to the Commissioner of the General Land Office, with a brief letter of transmittal, describing the case by its title, the motion of the contest and the tract involved.

Rule 53. The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioner.

It was shown that the value of the land in controversy exceeded the sum of six thousand dollars.

THE STATE OF WISCONSIN:

In Circuit Court for Douglas County.

WARREN E. McCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

This action having come on for trial at the regular February term of said court and the Honorable A. J. Vinje, judge of said court, having made and entered an order requesting the Honorable E. W. Helms, judge of the eighth judicial circuit of Wisconsin, to hold court for the trial of this action, and the trial having been
507 had before said court, the Honorable E. W. Helms presiding as judge thereof, commencing on the 29th day of April, 1902, and the court having heard the evidence and listened to arguments of counsel, makes and files its findings of fact and conclusions of law as follows:

I.

That Philip W. Jacobus was, on the 28th day of January, 1891, a natural born citizen of the United States and of the State of Wisconsin; that on said day he made actual settlement upon the northwest quarter (N. W. ¼) of section seventeen (17) in township forty-eight (48) north, of range eight (8) west, in the county of

Bayfield, and established an actual residence upon said lands on February 4th, 1891; that thereafter, and on February 23rd, 1891, said lands were duly opened under and by virtue of the laws of the United States for homestead settlement and entry; and that on said last named date said Jacobus duly made and presented to the land office at Ashland, Wisconsin, an application to enter said lands as a homestead. And that said lands were then subject to entry, and said application should have and would have been received and allowed by the officers of said land office, but for the
508 fact of the improper filing of a soldier's declaratory statement thereon by the defendant John F. Hill; that said Jacobus at the time of making such application fully complied with the laws of the United States in regard to homestead entries and was entitled to have such application filed and allowed; that thereafter, and by reason of the improper receiving of said soldier's declaratory statement, and rejection of the application of said Jacobus, he, the said Jacobus, duly instituted a contest proceeding against said Hill's soldier's declaratory statement, and such proceedings were had that on May 11th, 1891, and after a hearing of the parties in regular course, the register and receiver of said land office at Ashland, Wisconsin, found that said Jacobus settled upon said land prior to February 23rd, 1891, and recommended the cancellation of the soldier's declaratory statement filed by said Hill; that the defendant duly appealed to the Commissioner of the General Land Office, and thereafter proceedings were duly had and said appeal determined on April 29th, 1892, wherein and whereby it was found by the Commissioner of the General Land Office that said Jacobus settled upon said land on January 28th, 1891, and moved his family, consisting of a wife, thereon February 4th, 1891. That his residence on said land had been continuous, though he had been absent a considerable portion of the time, laboring at his trade for the purpose
509 of earning money to support himself and wife and improve his claim. That it was further found and determined by said Commissioner that the land was subject to entry, and that said Jacobus as a settler had a prior right to make such application and have the same allowed over that of the defendant's soldier's declaratory statement, and that said soldier's declaratory statement should be held for cancellation. That no appeal from said decision was taken, and the same became and was a final adjudication of the rights of the parties, and thereafter, and on July 6th, 1892, said soldier's declaratory statement of the defendant was cancelled and said Jacobus' homestead entry upon said land duly and regularly allowed and confirmed.

II.

That on September 20th, 1892, said Jacobus, after giving due notice of such application, duly applied to the land office at Ashland, Wisconsin, to have said homestead entry commuted to a cash entry, and that on said last named date the register and receiver

of said land office allowed and permitted said Jacobus to so commute, received from him the sum of $400 in full payment of said land, and said receiver issued to him a receiver's receipt for said land, acknowledging the payment for the same, and a certifi-
510 cate of entry was on said day issued to him by the register of said land office, certifying that said Jacobus, in pursuance of law, did on that day purchase of said register said northwest quarter of section seventeen, at the rate of $2.50 per acre, amounting to the sum of $400, and had made full payment as required by law, and was entitled on presentation of such certificate to the Commissioner of the General Land Office to receive a patent for said land in due and regular form. That on said 20th day of September, 1892, the time of the commutation of his homestead entry as above stated, said Jacobus, and also the register and receiver, and all other officers of said land office had no knowledge or information of the passage of the act of Congress of March 3rd, 1891, requiring fourteen months' residence and occupation on the lands after entry and before commutation should be made; that said Jacobus made and filed in said land office on said 20th day of September, 1892, due and regular proofs of his settlement, residence, occupation and improvements upon said land, all in due form of law. That said proofs were made and presented in good faith, were truthful in fact, and altogether free from fraud; and were made and filed in full belief that they were strictly in compliance with the law, and that the said proofs were received, accepted and
511 allowed by the register and receiver of said land office in full belief that the same were in every way regular and proper, and that said register and receiver, in receiving, accepting and allowing said proofs, issuing the receipt and certificate of entry above mentioned thereby, and in fact found upon the proofs so made that said Jacobus had resided upon said land continuously from the 4th day of February, 1891, had cultivated and improved the same, and fully complied with all the requirements of law in regard to the same as a homestead entry.

III.

That thereafter, and on or about the 27th day of December, 1892, the plaintiff, Warren E. McCord, and one Daniel McLeod purchased said land in good faith of said Jacobus, paying him therefor in cash and notes, which were afterwards fully paid, the sum of $4250, and received a warranty deed conveying to them the full title to said premises; that neither said McCord or McLeod had, prior to said purchase and conveyance, any interest in said lands, and had had no negotiations with said Jacobus more than ten days prior to the purchase and making of the deed on said December 27th, 1892.

IV.

That on or about December 17th, 1892, and at the time that
512 said McCord and McLeod first negotiated with said Jacobus for the purchase of said lands, and while upon said land for the purpose of estimating the value thereof, said McCord and McLeod made inquiry of the defendant John F. Hill, whether he had any claim upon said land, and whether Jacobus had good title thereto. That said Hill then and there stated to said McCord and McLeod that he had been fairly beaten in his contest with Jacobus, and had no claim upon said land, and that if said McCord and McLeod would buy the land he would make no claim upon it, and thereafter said defendant Hill and said McCord and McLeod duly made and signed the paper dated January 4th, 1893, and fully set out at folio — of the plaintiff's complaint. That at time of making the supplemental proofs above mentioned the defendant well knew that said McCord and McLeod were looking at said land with a view of purchasing same from said Jacobus, and that the inquiry was made of him with reference to said purchase. That the plaintiff McCord and said McLeod did in fact rely upon the statement made by the defendant and purchased the land and paid for the same by reason of such statements.

V.

513 That on or about the 15th day of May, 1893, the Assistant Commissioner of the General Land Office of the United States having had his attention called to the act of March 3rd, 1891, and disregarding the rule that an entry when allowed related back to the time of settlement, by letter to the register and receiver required said Jacobus to furnish supplemental proofs showing residence and cultivation for a period of fourteen months subsequent to July 6th, 1892, together with an affidavit that he had not alienated said land. That thereafter, and on or about the first day of September, 1893, the plaintiff McCord and said McLeod, together with their wives, duly executed and delivered to said Jacobus a deed of conveyance of said lands for and in consideration, as expressed therein, of the sum of $4300, and said Jacobus at the same time made and executed to said McCord and McLeod a mortgage upon said lands to secure the payment to them of said purchase money. That thereafter, and on or about the 12th day of September, 1893, said Jacobus made, and caused to be made and filed in the local land office at Ashland, Wisconsin, in response to the order requiring supplemental proofs, above mentioned, certain affidavits and proofs wherein and whereby it was shown that said land
514 was conveyed to said McCord and McLeod and reconveyed as hereinbefore stated, and that said Jacobus retained two acres of said land, and shortly after the sale of said premises, and on or about February 20th, 1893, he again went upon said land with his wife, and from that time up to the time of so filing said affidavits,

continued to reside upon and improve said lands. That it did not appear in said affidavits that said lands were reconveyed, or that said Jacobus went back upon said lands in order to obtain the title thereto for the benefit of said McCord and McLeod. That said affidavits were filed and transmitted as supplemental proofs, offered by said Jacobus, and were thereafter treated as so offered by the various officers of the department, including the register and receiver of the local land office at Ashland, the Commissioner of the General Land Office, and the Secretary of the Interior; that said defendant Hill, in entire disregard of his representations to McCord and McLeod and in violation of his agreement with them, on or about the 30th day of September, made and filed in the local land office at Ashland, contest affidavits, and also objections to the receiving of said offered supplemental proofs. That a hearing was had upon said contest and a large number of witnesses sworn; that it appears from the
515 testimony taken on said hearing that said Jacobus resided upon said land with his wife, was there most of the time from the time of his settlement in February, 1891, until the sale of the land to said McCord and McLeod in December, 1892. That Jacobus had no other home, though he had a barber shop at Iron River, and was necessarily absent for the purpose of earning a living for himself and wife, and money with which to improve the homestead. That the improvements upon the land were of the value of $250 and more; that he raised crops of hay, potatoes and other vegetables during the season of 1891 and 1892. That he fully complied with the law as to such residence, occupation and improvement of said land. That it further appeared from the testimony taken upon said hearing that the proofs made and filed by said Jacobus on September 20th, 1892, were truthful and in no manner fraudulent. That it further appeared upon said hearing by the testimony of Mr. Jacobus that the land in question was so reconveyed to him by said McCord and McLeod in September, 1893, and that he went back on said land after selling and conveying the same in December, 1892, for the purpose of acquiring the title for the benefit of said McCord and McLeod. That thereafter, and on August 9th, 1894, the register and receiver of the local land
516 office at Ashland, Wisconsin, made and filed an opinion upon said contest wherein they held that the residence of said Jacobus upon said land up to the time of the sale and conveyance of the same to McCord and McLeod in December, 1892, was fairly satisfactory. That their cabin and housekeeping equipments were superior to most homesteaders, and their clearing and cultivation compared favorably with that of others in the same neighborhood, but that the residence of said Jacobus after the sale and conveyance of said land to McCord and McLeod was for the sole purpose of enabling him to make proof to secure title for him, and that said land was so reconveyed to said Jacobus for the sole purpose of enabling him to make proof for the benefit of said McCord and McLeod. That upon appeal to the Commissioner of the

General Land Office the opinion of the register and receiver was affirmed, under date of January 23rd, 1895, the Commissioner expressly finding that Jacobus' house was well finished and well furnished; that he had about two acres cleared, and that the improvements were worth about $200. That said Commissioner further expressly found that the reconveyance of the land by McCord and McLeod to Jacobus was made so that he could submit his final proof for their benefit; that thereafter, and on April 28th, 1896, upon
517 appeal to the Secretary of the Interior, the decision of the register and receiver and of the Commissioner of the General Land Office above mentioned were duly affirmed, without re-stating the facts. That Congress thereafter passed the act of June 3rd, 1896, set forth in plaintiff's complaint at folio 75. That thereafter, and before the adoption of any rule of practice by the department under said act, said Jacobus made a motion before the Secretary of the Interior for a review of the decision of April 28th, 1896, and also to confirm the entry under said act, said motions, and both of the same, being based upon the records and files and proofs already submitted to said department. That thereupon the Secretary of the Interior made and filed his decision of August 4th, 1896, set forth at folio — of plaintiff's complaint. That it appeared from the records and files of said department and all of the proofs therein that there was no fraud on the part of said Jacobus in the making of the proofs of September 20th, 1892. That there was fraud or attempted fraud in the supplemental proofs offered, in that it did not appear therein that the land was reconveyed by McCord and McLeod to said Jacobus for the purpose of enabling him to make proofs for their benefit, and that it did not appear therein that he went back upon the land
518 for the purpose of making proof in their interest or for their benefit. And the court finds as a fact that the Secretary of the Interior in his decision of August 4th, 1896, referred to, in saying, "The evidence in the case at bar clearly shows that the entry was not made in good faith and the proofs submitted by the entryman was fraudulent as fully set forth in your office decision of January 23rd, 1895," referred only to the supplemental proofs and the want of good faith in attempting to make the same. That said Secretary referred solely to the supplemental proofs when he used the following language in said opinion: "It is likewise impossible to confirm the entry under the provisions of the act of June 3rd, 1896, for the same reason, namely, the practice of fraud in making proofs."

VI.

The court further finds that there was no fraud practiced by Jacobus in making the commutation proofs of September 20th, 1892, in that he then made final payment, that a final certificate of entry was then issued to him. That there were not on June 3rd, 1896, or at any time prior to the entry made by the defendant on September 7th, 1896, any adverse claimants to the land described in the cer-

tificate so issued or of any entry whose rights originated prior
519 to the making of such final commutation proofs. That there was, on June 3rd, 1896, at the time of the passage of said act and now is no other reason why the title to said lands should not vest in said Jacobus as provided in said certificate of entry. That there was more than six months' actual residence in good faith by said Jacobus prior to the making of his commutation proof September 20th, 1892. That the entry of said Jacobus was not cancelled until September 10th, 1896, and that the land was not re-entered by the defendant or any other person until September 7th, 1896. That a patent for said land was issued to the defendant Hill on January 12th, 1897. That on or about October 31st, 1896, said Jacobus and Lillian E. Jacobus, his wife, by a deed of conveyance in due form conveyed said land and all their interest therein to said McCord and McLeod. That thereafter, and before the commencement of this action, said McLeod duly conveyed to the plaintiff all his title and interest in said land, and that the plaintiff now owns and holds the full equitable title thereto.

VII.

The court finds that all of the facts stated in the plaintiff's complaint not inconsistent with the facts hereinbefore specially found, are true and sufficiently proven.

520 For its conclusions of law the court finds:

1. That the residence, occupation and improvement of the land in question by said Jacobus up to the time of the conveyance of the same in December, 1892, and all other proceedings being regular, including the commutation proofs, the issuing of the certificate of entry, the said Jacobus took and received from the Government a full and complete equitable title to the land, and only the bare legal title remained in the Government.

2. That the entry of said Jacobus allowed on July 6th, 1892, related back to his settlement upon the land in January, 1891, and that the commutation of his homestead entry to a cash entry on September 20th, 1892, was in all respects according to law.

3. That no supplemental proofs were necessary or required by law.

4. That the conveyance back by McCord and McLeod to Jacobus, and the making or attempting to make supplemental proofs was altogether unnecessary and immaterial.

5. That under the act of June 3rd, 1896, any concealment or fraud in the supplemental proofs was altogether immaterial and of no consequence.

6. That the decision of the Secretary of the Interior in refusing to confirm the title of Jacobus under the act of Congress of
521 June 3rd, 1896, was erroneous by reason of his mistake of law that fraud in the making of said supplemental proofs would prevent Jacobus from receiving title under that act.

7. That the defendant is estopped from making any claim or asserting any title to the land in question as against the plaintiff.

8. That the plaintiff is entitled to judgment and decree in this action adjudging that all title to the northwest quarter (N.W. ¼) of section seventeen (17), in township forty-eight (48), range eight (8) west, in Bayfield county, Wisconsin, held by the defendant, or any person or persons, or corporation holding by, through or under him, be given and set over unto and declared in the plaintiff, and to him, his heirs and assigns forever, and that he, and they, and each of them be forever enjoined and restrained from claiming, asserting or setting up any right, title or interest in or to said premises, or any part thereof. And further adjudged that said defendant execute and deliver to the plaintiff a deed of conveyance of said land in due form of law.

And judgment is ordered accordingly, with costs.

Dated June 28, 1902.

By the court,

E. W. HELMS, *Judge.*

522 Within ten days after notice of entry of judgment herein, the defendant, by his attorney, duly filed in the office of the clerk of the circuit court in Douglas county, objections and exceptions to the findings of fact and conclusions of law of the court made herein, which are in words and figures following, to wit:

STATE OF WISCONSIN:

In Circuit Court for Douglas County.

WARREN E. McCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

The defendant in the above entitled action objects and takes exception to the finding of fact heretofore made by the circuit court herein, as follows:

1. To the statement and finding (contained in the first finding) that Philip W. Jacobus made actual settlement upon the northwest quarter of section seventeen (17), township forty-eight (48) north, of range eight (8) west, on the 28th day of January, 1891.

2. To the statement and finding (contained in the first finding), that Philip W. Jacobus established an actual residence upon the land described in said finding on the 4th day of February, 1891.

3. To all that part of the first finding which states that on
523 the 23rd day of February, 1891, Philip W. Jacobus made and presented to the land office at Washington an application to enter the lands therein described as a homestead. That said application should have and would have been received and allowed

by the officers of said land office but for the improper filing of a soldier's declaratory statement thereon by the defendant John F. Hill. That said Jacobus at the time of making such application fully complied with the laws of the United States in regard to homestead entries and was entitled to have such application allowed.

4. To all that part of the first finding which states that after a hearing of the parties in regular course, the register and receiver of said land office at Ashland, Wisconsin, found that said Jacobus settled upon said land prior to February 23, 1891, and recommended the cancellation of the soldier's declaratory statement filed by said Hill. That it was found by the Commissioner of the General Land Office that said Jacobus settled upon said land on January 28th, 1891, and moved his family, consisting of a wife, thereon February 4th, 1891. That his residence upon said land had been continuous, though he had been absent a considerable portion of the time laboring at his trade for the purpose of earning money to support
524 himself and wife and improve his claim. That the decision of the Commissioner became and was a final adjudication of the rights of the parties. That said Jacobus' entry was confirmed on July 6, 1892.

5. To that part of the second finding which states that on September 20, 1892, the said Jacobus duly applied at the land office at Ashland to have said homestead entry commuted to a cash entry.

6. To all that part of the second finding which states that on said 20th day of September, 1892, the time of the commutation of his homestead entry, said Jacobus, and also the register and receiver and all other officers of said land office, had no knowledge or information of the passage of the act of Congress of March 3, 1891, requiring fourteen months' residence and occupation on the lands after entry and before commutation should be made.

7. To all that part of the second finding which states that said Jacobus made and filed in said land office, on said 20th day of September, 1892, due and regular proofs of his settlement, residence, occupation and improvements upon said land, all in due form of law; that said proofs were made and presented in good faith, were truthful in fact, and altogether free from fraud. That they were made and filed in full belief that they were strictly in com-
525 pliance with the law. That the said proofs were received, accepted and allowed by the register and receiver of said land office in full belief that the same were in every way regular and proper. That said register and receiver, in receiving, accepting and allowing said proofs, issuing the receipt and certificate of entry above mentioned thereby, and in fact found upon the proofs so made that said Jacobus had resided upon said land continuously from the 4th day of February, 1891, had cultivated and improved the same, and fully complied with all the requirements of law in regard to the same as a homestead entry.

8. To all of the third finding except the statement therein that

Warren E. McCord and Daniel McLeod received a warranty deed to said premises.

9. To all that part of the fourth finding which states that the conversation with Hill was at the time McCord and McLeod first negotiated with Jacobus for the purchase of the land, and that they were upon the land for the purpose of estimating the value thereof; and that Hill stated that if McCord and McLeod would buy the land he would make no claim upon it.

10. To that part of the fourth finding which states that at the
526 time of making the supplemental proofs above mentioned the defendant knew what is thereafter stated in said finding.

11. To that part of the fourth finding which states that the plaintiff McCord and said McLeod did in fact rely upon the statement made by the defendant, and purchased the land and paid for the same by reason of such statements.

12. To that part of the fifth finding which states that on or about the 18th day of May, 1893, the Assistant Commissioner of the General Land Office of the United States having had his attention called to the act of March 3, 1891, and disregarding the rule that an entry when allowed related back to the time of settlement.

13. To that part of the fifth finding which states that on or about the 12th day of September, 1893, in response to the order requiring supplemental proofs, Jacobus made and caused to be filed proofs.

14. To that part of the fifth finding which states that it did not appear in said affidavits that said land was reconveyed, or that said Jacobus went back upon said lands in order to obtain the title thereto for the benefit of said McCord and McLeod.

15. To that part of the fifth finding which states that said affidavits (therein referred to) were filed and transmitted as supplemental proofs offered by said Jacobus.

527 16. To all that part of the fifth finding which states that the affidavits therein referred to were treated by the various officers of the department, including the register and receiver of the local land office at Ashland, the Commissioner of the General Land Office and the Secretary of the Interior, as supplemental proofs.

17. To all that part of the fifth finding which states that it appears from the testimony taken on said hearing (the contest of Hill) that said Jacobus resided upon said land with his wife, was there most of the time from the time of his settlement in February, 1891, until the sale of the land to said McCord and McLeod in December, 1892. That Jacobus had no other home, though he had a barber shop at Iron River and was necessarily absent for the purpose of earning a living for himself and wife and money with which to improve the homestead. That the improvements upon the land were of the value of $250 and more. That he raised crops of hay, potatoes and other vegetables during the season of 1891 and 1892. That he fully complied with the law as to such residence, occupation and improvement of said land.

18. To the statement in the fifth finding that it appeared from the testimony taken upon the hearing (contest of Hill) that the
528 proofs made and filed by Jacobus on September 20, 1892, were truthful and in no manner fraudulent.

19. To the statement in the fifth finding that upon appeal to the Commissioner of the General Land Office, the opinion of the register and receiver, to the effect that the residence of Jacobus upon the land up to the time of the sale and conveyance of the same to McCord and McLeod in December, 1892, was fairly satisfactory. That their clearing and cultivation compared favorably with that of others in the same neighborhood, was affirmed.

20. To the statement in the fifth finding that thereafter, and on April 28, 1896, upon appeal to the Secretary of the Interior, the decision of the register and receiver was affirmed, and also any statement in said finding, in substance or effect, that the Secretary of the Interior affirmed any decision of the Commissioner or of the local land officers that the residence of said Jacobus upon the land was up to the time of the sale and conveyance of the same by him to McCord and McLeod, was fairly satisfactory or that their clearing and cultivation compared favorably with that of others in the neighborhood, or so decided himself.

21. To the statements in the fifth finding, and each and
529 every of them, and it appeared from the records and files of said department, and all of the proofs therein, that there was no fraud on the part of said Jacobus in the making of the proofs of September 20, 1892. That there was fraud or attempted fraud in the supplemental proofs offered, in that it did not appear therein that the land was reconveyed by McCord and McLeod to said Jacobus for the purpose of enabling him to make proofs for their benefit, and that it did not appear therein that he went back upon the land for the purpose of making proof in their interest or for their benefit.

22. To the statement in the fifth finding and at the conclusion thereof, "And the court finds as a fact that the Secretary of the Interior in his decision of August 4, 1896, referred to, in saying the evidence in the case at bar clearly shows that the entry was not made in good faith and the proofs submitted by the entryman was fraudulent as fully set forth in your office decision of January 23, 1895," referred only to the supplemental proofs and the want of good faith in attempting to make the same, that said Secretary referred solely to the supplemental proofs when he used the following language in said opinion, "It is likewise impossible to confirm the entry
530 under the provisions of the act of June 2, 1896, for the same reason, namely, the practice of fraud in making proofs."

23. To each and every statement in the sixth finding except the statements that a patent for said land was issued to the defendant Hill on January 12, 1897. That on or about October 31, 1896, said Jacobus and wife conveyed said land and all their interest therein to said McCord and McLeod. That thereafter and before the com-

mencement of this action said McLeod conveyed to the plaintiff all his title and interest in said land.

24. To the seventh finding, and each and every statement therein.

25. To the finding, in that the court failed and omitted to find as warranted from the undisputed evidence.

1. That the plaintiff was not a purchaser in good faith.

2. That the plaintiff was privy to the making of the fraudulent commutation proofs.

3. That Jacobus did not reside upon said land six months prior to the making of his commutation proofs.

4. That the Commissioner of the General Land Office determined that the entry of Jacobus was fraudulent.

531 5. That the Commissioner of the General Land Office determined that the commutation proofs made by Jacobus were fraudulent.

6. That the Secretary of the Interior determined that the entry of Jacobus was fraudulent.

7. That the Secretary of the Interior determined that the commutation proofs made by Jacobus were fraudulent.

8. That the Secretary of the Interior refused to confirm the entry of Jacobus, on the ground that his entry was fraudulent, and also that Jacobus practiced fraud in making his commutation proofs.

The defendant also excepts—

1. To the first conclusion of law.
2. To the second conclusion of law.
3. To the third conclusion of law.
4. To the fourth conclusion of law.
5. To the fifth conclusion of law.
6. To the sixth conclusion of law.
7. To the seventh conclusion of law.
8. To the eighth conclusion of law.
9. To the order for judgment.

W. F. BAILEY,
Att'y for Def't.

Plaintiff's Exhibit "B," affidavit of William Rusk, dated September 20, 1892, is the same as contained in defendant's answer, folios 34 to 38, and is therefore omitted.

Plaintiff's Exhibit "C," affidavit of Herbert Augusta, dated
532 September 20, 1892, is the same as contained in defendant's answer, folios 38 to 42, and therefore is omitted.

Plaintiff's Exhibit "D," affidavit of Philip W. Jacobus, dated September 20, 1892, is the same as contained in defendant's answer, folios 48 to 49, and is therefore omitted.

PLAINTIFF'S EXHIBIT "E."

No. 5534.

LAND OFFICE AT ASHLAND, WIS., *Sept.* 20, 1892.

It is hereby certified that in pursuance of law Philip W. Jacobus, residing at Iron River, in Bayfield county, State of Wisconsin, on this day purchased of the register of this office the N. W. ¼ of section No. 17, in township No. 48 N., of range No. 8 W., of the 4th principal meridian, containing 160 acres, at the rate of two dollars and fifty cents per acre, amounting to 400 dollars and — cents, for which the said Philip W. Jacobus has made payment in full as required by law.

Now, therefore, be it known, that on presentation of this certificate to the Commissioner of the General Land Office, the said Philip W. Jacobus shall be entitled to receive a patent for the lot above described.

H. L. BESSE, *Register.*

Endorsements across face—

"Cancelled September 10, 1896, by letter H. No patent to issue hereon, J. L. M.

533 Double minimum excess ordered to be refunded. Report No. 57598 W. Griffin, R.—C. Notes Sept. 12, '96, C. L. E.

Endorsements on back—

Plaintiff's Exhibit "U."

H. div. 107519–'93. No. 8432.

Cancelled No. 5534.

Cash entry.

Land office at Ashland, Wis., Sept. 20, 1892.

Sec. 17, town 48, range 8, proof premature, E. V. C. See to R. & R. May 15, 1893, to R. & R. July 6, '93. E. V. C.

Appearance of Copp & Luckett on behalf of J. F. Hill, Oct. 13, '93. 1893.

86496. Appearance of Wm. T. S. Curtis, Aug. 22, 1893. Notify him of any and all action. See request for time. A. M. H.

Nov. 18, '93, hearing ordered Copp & Luckett & W. S. T. Curtis advised. H. J. F. D.

Approved.

Div. C. List No. 54 by clerk.

Division cancelled.

Patented, cancelled.

See "H," Jan'y 13, '94, to W. T. S. Curtis for proof of service of motion for review. C. C. N.

Motion for review of action of Nov. 18, '93, denied by "H"
534 Feb'y 24, '94, & R. & R., directed to proceed to a hearing in case of Jno. F. Hill *v.* Jacobus. Copp & Luckett & W. T. S. Curtis advised. C. C. N.

Supplemental proof returned to R. & R. for use at hearing by H. April 18, '94, and attorneys advised. C. C. M.

April 25, 1895, to Hon. Sec'y on appeal, R. & R., and attorneys advised. H. C. H.

To R. & R., May —, '96, with copy of Sec'y's decision affirming this office. Unless motion for review is filed this entry will be cancelled and the case closed. J. L. M. H.

Sept. 10,-'96, to R. & R. Cancelled entry and closing case. J. L. M. "H." Notes Sept. 12, 1896.

PLAINTIFF'S EXHIBIT "F."

No. 5534.

RECEIVER'S OFFICE AT ASHLAND, WIS., *Sept.* 20, 1892.

Received from Philip W. Jacobus, of Bayfield county, Wisconsin, the sum of four hundred dollars and — cents, being in full for the N. W. ¼ of section No. 17, in township No. 48 N., of range 8 W., containing 160 acres and — hundredths, at $2.50 per acre.

R. C. HEYDLAUFF, *Receiver.*

" 400.00.

Duplicate.

H'd E. No. 3012 can. under sec. 2301 R. S. Act M'ch 3, 1877. 700 words at 15c. $1.05.

Endorsed on back—

535 STATE OF WISCONSIN:

Office of register of deeds, Bayfield county, Wis.

Received for record the 28th day of October, A. D. 1892, at 9 o'clock a. m., and recorded in vol. 24 of records on page 58.

W. H. IRISH,
Register of Deeds.

Plaintiff's Exhibit "G" is a warranty deed of the lands described in the complaint in this action, dated December 27, 1892, executed by Philip W. Jacobus and Lillian W., his wife, to Daniel McLeod and W. E. McCord, duly witnessed, acknowledged and recorded in the office of the register of deeds for Bayfield county, Wisconsin, on the 5th day of January, 1893, said deed stating that it is subject to a mortgage of $700 given by grantors to Walter C. Brooks.

PLAINTIFF'S EXHIBIT "J."

For the purpose of making a settlement with John F. Hill and his relinquishment on the N. W. ¼ of section 17, town 48, range 8 W., we hereby make him a present of a certain lot of logs now skidded on said land and give him permission till the first day of May, A. D. 1893, in which to enter on said land to remove said logs, and to occupy the house on said land and to remain on said land until that date, but not thereafter. Said logs amount to about 30 M. ft. And he agrees not to cut nor allow any of his men
536 to cut nor destroy any other timber. And in consideration of said logs I, John F. Hill, being duly sworn, on oath says that *he is* the man that made a soldier's application for said N. W. ¼ of 18–48, 8 W. And I make this affidavit for the purpose of relinquishing all my right, title and interest in and to said claim, which I do unto the United States.

Signed, sealed and delivered, and agreed upon this 4th day of January, A. D. 1893.

DANIED McLEOD.
W. E. McCORD. [L. S.]
JOHN F. HILL. [L. S.]

In presence of

W. H. PACKARD.
TRACY LYON.

STATE OF WISCONSIN, }
County of Bayfield, } ss:

Personally came before me this 4th day of January, A. D. 1893, the above named John F. Hill, to me know- to be the person who executed the foregoing instrument, and acknowledged the same.

W. H. PACKARD,
[SEAL.] *Notary Public.*

Plaintiff's Exhibit "K" is a mortgage by Philip W. Jacobus and wife to W. C. Brooks, upon the lands described in the complaint in this action for $700, dated October 28, 1892, duly executed, sealed, witnessed, acknowledged and recorded in the office of the
537 register of deeds for Bayfield county, Wisconsin, December 29, 1892.

Plaintiff's Exhibit "L" is a note for $700 signed by P. W. Jacobus and wife, payable to the order of Walter C. Brooks, six months after date, being the note secured by the mortgage Exhibit "K."

Plaintiff's Exhibit "M" is a satisfaction of mortgage executed by W. C. Brooks under date of April 25, 1893, sealed, witnessed, acknowledged and recorded in the office of the register of deeds for

Bayfield county, Wisconsin, May 2, 1893, being a satisfaction of the mortgage, Exhibit "K."

Plaintiff's Exhibit "N" is a quit-claim deed of the lands described in the complaint herein, dated September 1, 1893, executed by Daniel McLeod and his wife Etta and W. E. McCord and his wife Ellen C., to Philip W. Jacobus, duly sealed, witnessed, acknowledged and recorded in the office of the register of deeds for Bayfield county, Wisconsin, September 14, 1893.

Plaintiff's Exhibit "O" is a mortgage executed by Philip W. Jacobus to W. E. McCord and Daniel McLeod upon the lands described in the complaint herein, under date of September 12, 1893, for $4300, duly sealed, witnessed, acknowledged and recorded
538 in the office of the register of deeds for Bayfield county, Wisconsin. September 4, 1893.

Plaintiff's Exhibit "P" is a satisfaction of the mortgage Exhibit "O" under date of October 17, 1896, executed by Daniel McLeod and W. E. McCord to Philip W. Jacobus, duly sealed, witnessed and acknowledged and unrecorded.

Plaintiff's Exhibit "Q" is a quit-claim deed by Philip W. Jacobus and wife to Daniel McLeod and W. E. McCord, of the lands described in the complaint herein, under date of October 31, 1896, duly signed, sealed, witnessed, acknowledged and unrecorded.

Plaintiff's Exhibit "R" is a quit-claim deed of the lands described in the complaint herein (and other lands) dated March 22, 1898, from Daniel McLeod and wife to W. E. McCord, duly signed, sealed, witnessed, acknowledged and recorded in the office of the register of deeds for Bayfield county, Wisconsin, March 26, 1898.

PLAINTIFF'S EXHIBIT "S."

Township No. 48 N., range No. 8 W., district of Ashland, Wis.

Description of tract: Part of section H'd E. N. W. ¼, section 17, township 48 N., range 8 W.; contents, acres 160. Rate per acre, dollars, two, cents fifty ($2.50.) Purchase money, dollars, eighteen (18.) Name of purchaser, Philip W. Jacobus. Date of sale,
539 July 6, 1892, number of receipt and certificate of purchase, 3012. Cancelled by Com.'s letter "H," Sept. 10, 1896.

Description of tract part of section C. E. N. W. ¼, section 17, township 48 N., range 8 W., contents, acres 160; rate per acre, dollars four hundred ($400). Name of purchaser, Philip W. Jacobus. Date of sale Sept. 20, 1892. Number of receipt and certificate of purchase 5534. Canceled by Com.'s letter "H," Sept. 10, 1896.

Description of tract, part of section H'd E. N. W. ¼, section 17, township 48 N. range, 8 W.; contents, acres 160. Rate per acre, dollars one, cents twenty-five ($1.25). Purchase money, dollars fourteen ($14). Name of purchaser, John F. Hill; date of sale, October 6, 1896. Number of rec-ipt and certificate of purchase 4069. Allowed by Com.'s letter "H," Sept. 10, 1896.

Description of tract, part of section F. C. N. W. ¼, section 17, township 48 N., range 8 W. Contents, acres 160. Rate per acre, dollars one, cents twenty-five ($1.25). Purchase money, dollars four ($4). Name of purchaser John F. Hill. Date of sale, November 28, 1896. Number of receipt and certificate of purchase 1038. Date of patent, January 11, 1897. Where recorded, volume 2, page 491.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
ASHLAND, WISCONSIN, *March 17th*, 1902.

540 I, August Doenitz, register of the United States land office at Ashland, Wisconsin, having in charge the records of this office, do hereby certify that I have compared the hereto attached copy with the tract books on file in this office, as far as relates to the N. W. ¼ of sec. 17, tp. 48 N., range 8 W., 4th P. M., Wisconsin, and that the same is a true and correct transcript of the said tract books, and of the whole thereof.

AUG. DOENITZ, *Register.*

PLAINTIFF'S EXHIBIT "T."

"H."
J. L. M.
Doc. 6.—Case 8432.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept.* 10, 1896.

JOHN F. HILL *vs.* P. W. JACOBUS. } Involving H. E. No. 3,012, C. E. No. 5534, for N. W. ¼ of Sec. 17, Tp. 49 N., R. 8 W.

Register and receiver, Ashland, Wisconsin.

GENTLEMEN: In reference to the above entitled case, I enclose herewith a copy of the decision of the honorable Secretary of the Interior, dated August 4, 1896, denying the motion for review of departmental decision of April 28, 1896, which was in favor of Hill.

Said case is accordingly closed. Notify the parties in interest.

541 The entries are hereby cancelled. So advise Hill, and of his right to enter the land.

Respectfully,

E. F. BEST,
Ass't Commissioner.

I, August Doenitz, register of the United States land office at Ashland, Wisconsin, having in charge the records of this office, do hereby certify that I have compared the hereto attached copy with the letter in file in this office, and that the same is a true and correct transcript of the said letter.

AUG. DOENITZ, *Register.*

The affidavits of W. E. McCord, Philip W. Jacobus, John J. Kinney and Herbert Augusta, the first sworn to Sept. 5, 1893, and the others sworn to Sept. 12, 1893, appearing on pages 37 to 41 inclusive of the bill of exceptions, are Plaintiff's Exhibits "V, W" and "X." They were fastened together, being certified copies, and endorsed as follows:

U. S. land office, Ashland, Wis.
Involving C. E. No. 5532 of Philip Jacobus, for N. W. ¼, sec. 17, tp. 46 N., R. 6 W.
Supplemental proof.
Filed Sept. 12, 1893.

G. E. KUNTZ, *Register.*

Plaintiff's Exhibit "Y" is a certified copy of the decision of the register and receiver; and is as follows:

542 *Decision of the Register and Receiver.*

UNITED STATES LAND OFFICE,
ASHLAND, WIS., *May* 14, 1891.

Notice of contest issued in this case Feb. 28, 1891. Served personally for a period of thirty days. Trial had May 11, 1891; all parties present. From the testimony presented it appears that the land embraced in said No. — has been settled upon prior to the filing of the S. D. S. No. 73. We are therefore of the opinion that said S. D. S. No. 73 should be cancelled.

G. W. CARRINGTON, *Register.*
R. C. HEYDLAUFF, *Receiver.*

Plaintiff's Exhibit "Z" is a certified copy of the evidence taken on the hearing of the contest and other proceedings thereon.

Same is omitted by consent of counsel, being identical with the evidence and proceedings set out in defendant's answer, folios 74 to 520 inclusive.

PLAINTIFF'S EXHIBIT "A 1."

IRON RIVER, WIS., *Dec.* 21, 1892.

Received of W. E. McCord the sum of two hundred and fifty dollars as a part payment of the sum of four thousand two hundred and fifty dollars ($4250), agreed upon by the parties hereto as the purchase price for the northwest quarter of section seventeen
543 (17), township No. forty-eight (48) N., range eight (8) west, containing one hundred and sixty acres more or less according to the Government survey. The balance of the purchase money to be paid in cash or notes that are acceptable as cash when Wt. D.

with abstract showing good and sufficient title to said land is delivered to said McCord, which shall not be later than 10 days from date.

Signed in presence of
W. R. HOOVER.

P. W. JACOBUS.
W. E. McCORD.

PLAINTIFF'S EXHIBIT "B 1."

IRON RIVER, *Dec. 27th*, 1892.

Received of Daniel McLeod and W. E. McCord pay in full for the N. W. ¼, 17–48–8 W., as follows:

Cash down to bind the bargain	$250.00
Cash when deed and abstract are delivered	1000.00
They assume the Brooks mortgage	700.00
Their note due July 1st, 1893	766.67
Their note due Oct. 1st, 1893	766.67
Their note due Jan'y 1st, 1894	766.67
	$4250.00
And money paid my wife Lillian	50.00
	$4300.00

P. W. JACOBUS.
LILLIAN E. JACOBUS.

PLAINTIFF'S EXHIBIT "C 1."

$766.66. DECEMBER 27, 1892.

544 July 1st, after date, we promise to pay to the order of Lillian Jacobus seven hundred sixty-six and 66-100 dollars, at the First National Bank of Chippewa Falls, Wisconsin. Value received, with interest at 8 per cent. per annum.

DAN McLEOD.
W. E. McCORD.

Endorsed on face: "First national bank, paid July 2, 1899 Chippewa Falls, Wis."

Endorsed on back: "Lillian Jacobus," and "paid three hundred ninety-nine 18–100 by Dan McLeod, July 1, 1893."

PLAINTIFF'S EXHIBIT "D 1."

$766.66. DECEMBER 27, 1892.

October 1st, after date, we promise to pay to the order of Lillian Jacobus seven hundred sixty-six and 66–100 dollars at the First National Bank of Chippewa Falls. Value received, with interest at 8 per cent. per annum.

DAN McLEOD.
W. E. McCORD.

Endorsed on back: "Lillian Jacobus."
Endorsed on face: "First national bank; paid Oct. 3, 1893, Chippewa Falls, Wis."

PLAINTIFF'S EXHIBIT "E 1."

$766.67. DECEMBER 27TH, 1892.

January 1st, 1894, after date we promise to pay to the order of Lillian Jacobus, seven hundred sixty-six and 67–100 dollars,
545 at the First National Bank of Chippewa Falls. Value received with interest at 8 per cent. per annum.

DAN McLEOD.
W. E. McCORD.

Endorsed on face: "First national bank; paid Jan. 20, 1894, Chippewa Falls, Wis."
Endorsed on back: "Lillian Jacobus."

PLAINTIFF'S EXHIBIT "F 1."

STATE OF WISCONSIN, } ss:
County of Douglas, }

Personally appeared before me, A. B. Ross, a notary public in and for Wisconsin, John F. Hill, of Bayfield county, Wisconsin, who upon his oath says, that he is well acquainted with the tract of land embraced in homestead entry of Philip W. Jacobus, No. 3012, made July 6th, 1892, of the N. W. ¼ of sec. 17, tp. 48 N., of range 8 W., Wisconsin. That said Jacobus did not settle upon or enter said land in good faith for the purpose of making it his home, but for purposes of speculation. On Sept. 20, 1892, Jacobus made final proof and commuted, "and within a short time sold timber and all of the land," and wholly abandoned the land, and has since continued to abandon the land, and for a period of over

six months next prior to the date hereof. Jacobus and witnesses testified falsely in making his final proof. Neither prior to nor since Sept. 20, 1892, has Jacobus complied with the
546 intent and requirements of the homestead law in the matter of residence, improvements and cultivation. Since sometime in the spring of 1892 Jacobus and wife have lived and kept house in Iron River. "Affiant has been recently informed and verily believes that W. E. McCord, who purchased the land and timber, deeded the land back to Jacobus in order that Jacobus might make the supplemental proof required by the honorable Commissioner," and has offered to pay said Jacobus a salary if he would live on the land till patent issued. In spite of his abandonment and in spite of the fact that Jacobus has not lived on said land, in order that he could make the supplemental proof required by the honorable Commissioner's order, Jacobus went to Ashland on Sept. 8th, 1893, as affiant has been informed and believes, for the purpose of making the supplemental proof required by the Commissioner's order, but affiant entered objection to such supplemental proof, and said Jacobus did not attempt to make the same. Affiant says that since the month of July, 1891, affiant and his family have resided continuously on said land, cultivating and improving the same in accordance with the requirements of the homestead law, and this the said contestant is ready to prove at such time and place as may be named
547 by the register and receiver for a hearing in said case; and he therefore asks to be allowed to prove said allegations, and that the said homestead entry, No. 3012, may be declared cancelled and forfeited to the United States, he the said contestant, paying the expenses of such hearing.

JOHN F. HILL.

Subscribed and sworn to before me this 30th day of Sept., 1893.

A. B. ROSS,
Notary Public, Wisconsin.

[SEAL.]

PLAINTIFF'S EXHIBIT "G 1."

STATE OF WISCONSIN, } ss:
County of Douglas, }

Charles Helmer also appeared before me, and being duly sworn deposes and says that he is well acquainted with the tract of land described in the annexed affidavit of John F. Hill, and knows from personal observation that the statements therein made concerning residence and improvements of Philip W. Jacobus and John F. Hill are true, and knows that said Jacobus has abandoned the said claim, and upon information and belief says that the statements other than those mentioned are true.

CHARLES HELMER.

Subscribed and sworn to before me this 30th September, 1893.

[SEAL.] A. B. ROSS,
Notary Public.

548 PLAINTIFF'S EXHIBIT "H 1."

STATE OF WISCONSIN, } ss.:
County of Douglas, }

A. B. Ross, being first duly sworn, on oath says that he is attorney for John F. Hill in the matter of the contest by said Hill of the entry and final proof of Philip W. Jacobus; that affiant has talked with said Jacobus at various times; that in one conversation in the latter part of August or the fore part of September said Jacobus stated to affiant that he was going to make supplemental proof, required by the Commissioner, and in a later conversation stated to affiant that McCord, to whom Jacobus conveyed the timber and land, had deeded the same back to him, said Jacobus, so that he could make supplemental proof all right. Affiant further says that said Jacobus stated to affiant in the conversation first above mentioned, that he, Jacobus, had got his money out of the claim, and didn't care what became of it.

A. B. ROSS.

Subscribed and sworn to before me this Oct. 3rd, 1893.

[SEAL.] FRANK H. RUGER,
Notary Public, Wisconsin.

In Circuit Court, Douglas County.

WARREN E. McCORD, Plaintiff, }
vs.
JOHN F. HILL, Defendant. }

549 The foregoing bill of exceptions contains all the testimony, evidence, proceedings, rulings, decisions objections and exceptions had, given, made or taken on the trial of the above entitled cause, and because none of the same appear of record in said cause, I, the undersigned judge before whom the said cause was tried, have for the purpose of making the same of record in said cause, signed, settled, and allowed the foregoing bill of exceptions in said cause, which is hereby made a part of the record therein this 8th day of November, A. D. 1902.

E. W. HELMS,
Circuit Judge.

(Endorsed:) Warren E. McCord *vs.* John F. Hill. Bill of exceptions. Filed Nov. 14, 1902. Wm. H. Locke, clerk circuit court, Douglas Co., Wis. Filed Nov. 29, 1902. Clarence Kellogg, clerk of supreme court, Wis.

550 THE STATE OF WISCONSIN:

In Circuit Court for Douglas County.

WARREN E. McCORD, Plaintiff,
vs.
JOHN F. HILL, Defendant.

It is hereby stipulated between the parties that the annexed bill of exceptions is correct and may be signed by the Honorable E. W. Helms, judge of the circuit court, who tried and determined said action, excepting that Judge Helm shall decide and determine without argument whether the rules inserted in said proposed bill shall stand as a part thereof, and shall strike them out or leave them in as he so determines.

Dated November 5th, 1902.

SANBORN, LUSE, POWELL & DE FOREST,
Attorneys for Plaintiff.
W. F. BAILEY, *Attorney for Defendant.*

(Endorsed:) Circuit court, Douglas county. Warren E. McCord, pl'ff *vs.* John F. Hill, def't. Stipulation. Filed Nov. 28, 1902. Wm. H. Locke, clerk circuit court, Douglas Co., Wis. Filed Nov. 29, 1902. Clarence Kellogg, clerk of supreme court, Wis.

551 STATE OF WISCONSIN, } *ss.*:
County of Douglas, }

In Circuit Court.

I, Wm. H. Locke, clerk of the circuit court in and for said county and State, do hereby certify that the annexed papers were filed in my office on the dates thereon indicated and are a part of the original papers on file in my office in an action entitled Warren E. McCord, plaintiff against John F. Hill, defendant, and that the same are transmitted to the supreme court of the State of Wisconsin in pursuance of a notice of appeal and undertaking hereto attached and made a part of this record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this — day of November, A. D. 1902.

[SEAL.] WM. H. LOCKE, *Clerk.*

(Endorsed:) Warren E. McCord *vs.* John F. Hill. Filed Nov. 29, 1902. Clarence Kellogg, clerk of supreme court, Wis.

552 And afterwards, to-wit: at the January term of said court, on the twenty-sixth day of February, A. D. 1903, the same being the thirteenth day of said term, the following proceedings were had in this court, in this cause, that is to say:

Douglas Circuit Court.

WARREN E. McCORD, Respondent,
vs.
JOHN F. HILL, Appellant.

And now at this day came the parties herein by their attorneys, and this cause having been argued by W. F. Bailey, Esq. for the said appellant, and by Messrs. L. K. Luse, A. L. Sanborn and J. B. Sanborn for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

553 And afterwards, to-wit: on the twenty-first day of March, A. D. 1903, the same being the nineteenth day of said term, judgment was rendered in said cause, by this court, in the words and figures following, that is to say:

Douglas Circuit Court.

WARREN E. McCORD, Respondent,
vs.
JOHN F. HILL, Appellant.
Opinion by Justice Dodge.

This cause came on to be heard on appeal from the judgment of the circuit court of Douglas county, and was argued by counsel. On consideration whereof: it is now here ordered and adjudged by this court, that the judgment of the circuit court of Douglas county, in this cause, be and the same is hereby affirmed, with costs against the said appellant taxed at the sum of sixty-nine and $\frac{75}{100}$ dollars ($69.75).

Justice Marshall took no part.

And thereupon this court, by Justice Dodge, filed its opinion in said cause, in the words and figures following, that is to say:

554 WARREN E. McCORD, Respondent,
vs.
JOHN F. HILL, Appellant.

This is the same action considered upon demurror to the complaint, reported 111 Wis. 499. It has since been tried, the evidence upon the trial consisting in the main of the records of the proceedings and profert of the documents referred to in the complaint, with some oral evidence in addition. The findings are substantially in accordance with the facts as set forth in the complaint, so far as the same are material. Certain variances between the facts stated in the complaint and those appearing on the trial and certain additional facts are sufficiently stated in the opinion. Judgment was rendered in favor of the plaintiff on July 10, 1902, adjudging that the legal title held by the defendant, John F. Hill, be set over and transferred to the plaintiff, Warren E. McCord, as of the date of the patent from the United States, and that the defendant and all claiming under him be barred from having or claiming any interest, either legal or equitable, and be restrained from setting up or claiming any right, title or interest in the land or in any timber standing or growing thereon on January 12, 1897, or at any time thereafter. From that judgment the defendant appeals.

DODGE, *J.*:

Upon a former appeal in this case, considering the complaint upon demurrer (111 Wis. 499), we rendered decision upon certain questions raised as to the rights of the parties, dependent upon facts set forth by the complaint. Upon familiar principles closely approximating those of *res adjudicata* and not infrequently so-called, that decision became the law of this case, both for this court and the lower court, at all subsequent stages, except so far as the situation disclosed by the complaint and considered upon the
555 demurrer was altered in respects material to the conclusions then reached. Parker *v.* Pomeroy, 2 Wis. 112; Keystone L. Co. *v.* Kolman, 103 *id.* 300; Crouse *v.* C. & N. W. Ry., 104 *id.* 473, 480; So. Bend Co. *v.* Cribb Co., 105 *id.* 443. It is therefore necessary, in considering the present appeal, to start with such former decision and ascertain how far the situation has been modified by the introduction of evidence, and whether such modifications are material. The propositions decided on the former appeal may be summarized as follows, namely: that in September, 1892, the officers of the Land Department, in granting Jacobus the privilege of pre-emption entry in commutation of his previous homestead entry, decided that his entries were made in good faith; that he had resided upon the land in compliance with the homestead laws for at least six months prior to said commutation, and that his final proofs, upon which the pre-emption entry was allowed, were not fraudulent. Such entry could

not have been allowed in absence of those facts. We next decided, after a care- examination of the proceedings upon the contest raised by Hill over the attempt to make supplemental proofs, so far as the complaint set them forth, that neither the local land officers, the Commissioner, nor the Secretary had ever reversed this finding of fact, but that the rejection of such supplemental proofs went upon the ground of fraud occurring therein; that under the act of 1896 such fraud was no obstacle to Jacobus' right to a confirmation of such prematurely allowed entry of September, 1892; hence that the refusal of such confirmation and the allowance of Hill's entry and subsequent patent were all by mistake of law and conferred upon the latter merely the empty legal title which the United States at that time held in trust for the holder of the full equitable title which the act of 1896 had conferred upon Jacobus by virtue of the facts so found to exist. Upon the trial, no change whatever was made or even attempted to be made by evidence as to the situation presented
556 before the land officers at the time of their decision in September, 1892, though some attempt is now made to argue that they neither had the power nor attempted to decide anything then; a position which seems to be not only in contravention of our former decision, but of the holdings of the Federal courts that the decision of the facts under such circumstances rests with the local land officers, subject to appeal or other review. Moore *v.* Robbins, 96 U. S. 530, 532; Parsons *v.* Vensky, 164 *id.* 79, 92. Hence our former ruling that the facts of good-faith entry, six months' residence, and honest final proofs had been decided to exist by the land officers, must control now.

The decision of the second question, namely, that of the construction to be given the various rulings of the land officers, but especially the final order of the Secretary of the Interior of August 4, 1896, denying motion to confirm the entry of September, 1892, rested upon many facts of more or less cogency. In these, as they appeared or were deemed to appear from the allegations of the complaint, there has been some change shown by the evidence. Thus, it is urged by the appellant that the evidence shows facts variant from the assumption contained in the former opinion that Jacobus in his attempted supplemental proofs concealed or attempted to conceal from the land officers the fact of his abandonment of the premises as a home and of the transfer thereof to McLeod and McCord. It now appears from the evidence that his affidavits on this occasion did disclose that he temporarily left the land, in the belief that his title was complete, and conveyed the same to McLeod and McCord, but that the same had been reconveyed to him and his residence resumed. The only materiality of the fact, assumed or stated in the former opinion, was to establish that there were acts in Jacobus' supplemental proofs which were deemed fraudulent as against the United
557 States and which could serve as the basis for the decision of the Secretary of the Interior that confirmation must be refused by reason of fraud in making proofs. Examination now

made of the entire record of this contest shows that the fraud which the local land officers pointed out in their opinion, to which reference was made in the affirmance of that opinion by the Commissioner of the General Land Office and in the affirmance of his decision by the Secretary of the Interior, was in attempting to impress those tribunals with the idea that he, Jacobus, had in good faith reacquired the title to these premises and had renewed his residence thereon for the purpose contemplated by the homestead laws of making the premises his home, and not for the forbidden purpose of acquiring title for some one else. Thus, it is declared by the register and receiver, after reciting these conveyances and Jacobus' conduct, "The bare statement of facts points to the conclusion that the sale of the land in December, 1892, was absolute, and that the subsequent residence of Jacobus on the land was as agent of the transferees and for the purpose of acquiring title for them." And again, that the various facts recited "show that the land was not reconveyed to Jacobus in good faith, but for the purpose of enabling him to make supplemental proof for the benefit of the grantees. We are of opinion, therefore, that Jacobus' supplemental proof cannot be sustained and that the entry should be canceled and a preference right of entry awarded to the contestant here." Hence there is now presented the same circumstance as on the previous appeal; namely, that the supplemental proofs did contain elements of concealment which the land officers deemed fraudulent. That is all there was or is material to the conclusion reached on the former appeal. Counsel for appellant argue that no such fraud existed in fact, because there is not sufficient evidence of any agreement on Jacobus' part
558 at the time of receiving the reconveyance from McCord and McLeod that he would again convey the premises to them when he had perfected title. That, however, is immaterial. The question before us is not so much whether fraud existed, as whether it might have been and was decided to exist by the land officials. The record discloses now, as on the former appeal, that there was in the supplemental proofs concealment of a purpose which the land officers decided to exist, and that such concealment was by them decided to constitute a fraud. That, as we held before, was the fraud in making proofs which the register and receiver found to exist and reported in their opinion, which the Commissioner affirmed, and to which it must be held the Secretary of the Interior referred when declaring in his order refusing confirmation, August 4, 1896, that such refusal was upon the ground of the practice of fraud in making proofs. The change resulting from the evidence as to the mere subject of the concealment practiced does not modify the situation so as to relieve us from the controlling effect of our former judgment.

Again, it was said in our former opinion that Hill's protest against the supplemental proofs made no suggestion "that the original proofs offered and accepted in September, 1892, were characterized by any fraud or fraudulent practice, and no issue as to the *bona*

fides of Jacobus in tendering those proofs was presented." This statement was apparently borne out by the allegations of the complaint, but is shown to be incorrect by the introduction in evidence of Hill's affidavit of protest, which, while still throwing special weight upon the fraudulent practices occurring thereafter, expressly alleged that "Jacobus and his witnesses testified falsely in making his final proofs;" hence the assumption made in the former opinion that there was no issue upon which the land officers could have inquired or decided with reference to fraudulent prac-
559 tices in the proof of September, 1892, must disappear from present consideration, and those decisions be construed in the light of the fact that an issue was raised by Hill's contest upon which the land officers might have again considered and decided upon the good faith or fraud of the original proofs made in September, 1892, upon which Jacobus was allowed to prećmpt and received his certificate. That no such question was in fact considered, however, seems to be settled by the report of the local land officers, where, after reciting what charges had been made, they declare the issues upon which they deem it necessary to express their opinion as, "1. Did Jacobus abandon the land? 2. Was the sale of the land to McCord and McLeod a bar to the offering of supplemental proof?" We still think it plain, therefore, that no questions involving Jacobus' proceedings up to and including the final proof of September, 1892, were passed upon in the consideration of the contest had in 1894. Indeed, this seems to be the view of appellant's counsel as well, for he declares in his brief that "no question of *mala fides* was found in the making of proofs (of September, 1892), nor was the subject considered; simply, from the evidence, which was the same as the affidavits, they determined the second question which they stated at the outset, that the sale of the land to McCord and McLeod was a bar to the offering of supplemental proof." It was for this reason, and for no other, that the local land officers reached the conclusion and declared their opinion that the supplemental proof could not be sustained, and that Jacobus' entry should be canceled. The Commissioner of the General Land Office made no order in this connection except to affirm that opinion. The final order of the Secretary of the Interior denied confirmation on the ground of practice of fraud in making final proofs, "as fully set forth in your (Commissioner's) office decision of January 23, 1895."
560 Thus the final decision of the Secretary is by a series of references tied back to the practice of fraud in making the supplemental proofs described in the opinion of the local land officers and made the ground of their recommendation against Jacobus. We therefore adhere to the conclusion formerly reached that nowhere in any of the proceedings subsequent to the commutation proofs was there any reconsideration of the facts then passed on, certainly no reversal or attempted reversal of the decision then necessarily made of the facts essential to the allowance of the pre-

emption entry. Those facts entitled Jacobus to confirmation and patent under the act of 1896, thus creating in him full equitable title.

2. A further ground which the circuit court found to support its judgment is that the defendant is estopped from making any claim or asserting any title to the land in question as against the plaintiff. The facts whereon this conclusion is based are substantially as follows: The defendant, knowing that plaintiff and McLeod had in contemplation the purchase from Jacobus in December, 1892, and being inquired of as to the rights of Jacobus and his own claims, stated that he had been fairly beaten in his contest; that he had no claim; that Jacobus had a good claim, which he advised them to buy, and that if they would do so and would let him, Hill, take away some logs already cut, he would make no claim. Thereafter, in expressed consideration of said logs, he made written relinquishment to the United States of all rights in the land. The trial court finds that plaintiff and McLeod relied on such assurances. In our decision upon the demurrer, we ruled that this could not estop Hill from setting up subsequent conduct of Jacobus which might defeat his title, nor from acquiring new title himself not depending upon facts existing at the time of making the declarations. That decision is of course the law of this case. Upon the trial
561 it appeared, however, that he did not content himself with either opposing Jacobus' patent or basing his own claims upon such subsequent facts. He attacked the good faith of Jacobus' original entry and asserted fraudulent practices and false swearing in his proofs of commutation made in September, 1892, and alleged his own settlement on the land in July, 1891. If, therefore, we should concede appellant's contention that a patent was denied Jacobus and his entry canceled because, upon Hill's said contest, it was made to appear that the original entry was in bad faith and the commutation proofs fraudulent, whereby he was accorded preference right of entry, it would seem obvious that Hill's title has been acquired by virtue of acts and claims on his part wholly inconsistent with his assertions made to the plaintiff, in reliance on which the latter paid Jacobus $4,300 and gave Hill a quantity of logs. We cannot doubt that the doctrine of estoppel precludes him from such change of front to his benefit and respondent's injury. Vilas *v.* Mason, 25 Wis. 310; Kingman *v.* Graham, 51 *id.* 232, 248; Two Rivers Co. *v.* Day, 102 *id.* 328; Leather M. Bank *v.* Morgan, 117 U. S. 96, 109; Beatty *v.* Sweeney, 26 Mich. 217; Mayer *v.* Erhardt, 88 Ill. 452; Hendricks *v.* Kelly, 64 Ala. 388; Mayer *v.* Ramsey, 46 Tex. 371; Downer *v.* Flint, 28 Vt. 527; Pendleton *v.* Grannis, 14 Land Dec. 381. When appellant declared that Jacobus' claim was a good one and encouraged respondent to purchase upon such supposition, and the latter acted upon such assurance, he acquired a right, as against Hill, that he should not assert the contrary, at least upon the basis of any facts then existing. While this right could not be urged against the United States to prevent it from reclaiming the land, it is enforcible against Hill to prevent him

from profiting at the expense of respondent by means of denial of the fact declared by him to exist, and a court of equity can require him to hold any benefits acquired by such means as construc-
562 tive trustee for the benefit of plaintiff; to the extent, at least, of the rights which the latter would have acquired had the repudiated assertions been true. We concur in the conclusions of the trial court that on this ground as well appellant must be charged as constructive trustee of the whole title for the respondent and decreed to convey it to him, if the construction we have placed on the various decisions of the land office be erroneous and that contended for by appellant be correct.

3. The court below also decided, as a basis for the judgment, that Jacobus, having made application to enter this land in February, 1891, and having established his residence thereon at that time and continued it up to September 20, 1892, was entitled to commute into a preëmption entry at that time, not only under the provisions of sec. 2301 R. S. U. S., as amended in 1880, but also under the act of March 3, 1891, which required fourteen months' residence "after the date of entry." This conclusion was reached by applying the rule contended for by the plaintiff upon the former appeal, and mentioned but not decided in the opinion upon rehearing, to the effect that when an applicant, having the right to enter, completes all the acts required of him to effect that result, delay of the land officers to note on their books such entry cannot affect his rights whether such delay results from hearing and deciding the contest, or from any other cause; that a rightful application to enter is tantamount to entry, and the real date of applicant's entry is when he completes all of the acts on his part necessary thereto. We find ourselves unable to agree with the trial court that there is any showing of the conditions to which this rule is applicable. It is alleged in the complaint that Jacobus made application to enter this land in February, 1891, but the fact is not proved. It does appear, however, from the order of the Commissioner of the General
563 land office of April 29, 1892, that Hill made application to locate the same under his military warrant, and that Jacobus contested that application. The final order upon that proceeding was that the contest be sustained and that Hill's declaratory statement be canceled and that Jacobus be allowed, within thirty days, under a preference right, to enter the land; not that any prior application of his be allowed. Thereupon Jacobus did, on July 6, 1892, make application to enter, which application was allowed and the entry based on it constituted the basis for his subsequent commutation and preëmption in the September following. Thus it fails to appear that his rights arise out of an application to enter filed in February, 1891, allowed at a later date, but merely that during the period prior to July, 1892, he had settled on the land and contested Hill's application therefor, thus securing a mere preference right; which, as decided upon the former appeal, did not of itself constitute entry.

Appellant assails many of the findings of fact, some of which we confess are not very material and therefore the assault thereon need not be considered. Amongst others, however, is the finding by the trial court, as an independent fact, that Jacobus' original proofs were honest and free from fraud and proceeded by more than fourteen months of actual residence upon the land as and for a homestead. It suffices to say that upon these questions the evidence is at least fairly conflicting, and we are unable to say that there is any clear preponderance against this finding, which, in the view we have taken of the decisions of the land officers, is not very material, unless it should be deemed essential to the standing of the plaintiff in a court of equity to invoke its aid to charge the defendant with a trust in his favor.

The finding that McCord and McLeod purchased the interest of Jacobus in good faith is also assailed, but here also we are
564 satisfied that the evidence is sufficient to support the finding. Indeed, there is very little to throw doubt upon their good faith in the original purchase in December, 1892, to which they both testified, and the transactions are sufficient to warrant the inference drawn by the trial court and also, apparently, drawn by the land officers, that the reconveyance to Jacobus in September, 1893, and the taking of a mortgage from him, followed later by conveyance back to McCord and McLeod, were all colorable and merely formal; leaving them at all times, as between Jacobus and themselves, the real owners of his equitable interest in the land, so that their present title really dates from the original conveyance to them in December, 1892.

The finding that McCord and McLeod relied on Hill's statements to them with reference to his own and Jacobus' claims against the land at the time when they purchased from the latter, is also assailed by appellant. The finding has support in the direct testimony of both McLeod and McCord, which stands almost without contradiction, save for a somewhat ambiguous answer made by McCord upon examination before trial, certainly not sufficient to constitute that overwhelming preponderance against his direct testimony upon the trial which could justify us in repudiating the finding by the circuit court.

We therefore reach the conclusion that upon either the first or the second of the grounds above discussed, in the alternative, the judgment appealed from is correct.

By the COURT: Judgment affirmed.

Justice Marshall took no part.

565 JOHN F. HILL, Plaintiff in Error,
vs.
WARREN E. McCORD, Defendant in Error.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause.

That the original writ of error, the petition therefor, the citation with its service endorsed thereon, the assignment of errors and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Madison, this 12th day of May, A. D. 1903.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of Supreme Court Wisconsin.

Endorsed on cover: File No. 18,954. Wisconsin supreme court. Term No. 303. John F. Hill, plaintiff in error, vs. Warren E. McCord. Filed June 1st, 1903. File No. 18,954.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 303.

JOHN F. HILL, PLAINTIFF IN ERROR,

vs.

WARREN E. McCORD.

In Error to the Supreme Court of the State of Wisconsin.

Brief and Argument on Part of Plaintiff in Error.

Statement of the Case.

The original action was in equity brought by the defendant McCord, to obtain a decree declaring that the plaintiff in error, Hill, held the legal title to the northwest quarter of section seventeen (17), in township forty-eight (48) north, of range eight (8) west, in Bayfield County, Wisconsin, in trust for the plaintiff, that said McCord claiming to be the equitable owner of said tract as grantee of one Philip Jacobus, and that the latter was equitably entitled to a patent of the land from the United States, a patent therefor having been issued to said Hill through a mistake of law on the part of the Secretary of the Interior.

It appears that Jacobus and Hill each made application to enter the land as a homestead, the latter filing a soldier's declaratory statement. Upon a contest made by the former against the allowance of the entry of the latter, it was determined that the said Jacobus had a preference right to enter the land as a settler thereon prior to and at the date of the filing. (P. 38 Rec.) Such entry of Hill was formally cancelled upon the books of the local land office July 7, 1892, and the entry of Jacobus allowed as of July 6, 1892. (P. 59 Rec.)

On the 20th day of September, 1892, Jacobus made final

proof and commuted by paying four hundred ($400.00) dollars, and received a certificate of entry. (P. 285 Rec.)

In December, 1892, the said Jacobus conveyed said land to McCord and McLeod for the expressed consideration of $4250.00. (Ex. "G," p. 286 Rec.)

The Commissioner of the General Land Office, on May 15, 1893, determined that the original entry of Jacobus was made subsequent to the Act of March 3, 1891, which required that parties proposing to commute their homestead entries to cash, must make proof of residence and cultivation for a period of fourteen months from the date of entry, and required Jacobus to furnish supplemental proof showing residence and cultivation for a period of fourteen months subsequent to July 6, 1892, the date of entry, together with *non al* affidavit. (P. 258 Rec.) June 19, 1893, Jacobus filed a motion to review this decision and order, which motion was denied July 6, 1893. (P. 258 Rec.) September 12, 1893, Jacobus made and filed affidavits of McCord and himself, setting forth in substance, that he had conveyed the land to McCord and McLeod in December, 1892. That upon learning that a residence of fourteen months was required, he resumed his residence upon and cultivation of the land. That on the 5th day of September, 1893 (the date of McCord's affidavit), McCord and McLeod had reconveyed the land to him and he had executed to them a mortgage thereon for the full consideration of $4250.00; also that he had resided upon said land since resuming his residence thereon. (P. 261 Rec.) These affidavits are what the defendant has termed the supplemental proofs called for by the Commissioner. October 6, 1893, Hill filed a contest affidavit, alleging that Jacobus did not settle upon or enter said land in good faith to make it his home, but for the purpose of speculation. That on September 20, 1892, Jacobus made final proof and commuted, and within a short time sold the timber and the land and wholly abandoned it. That he did not reside upon the land during the six months next preceding the making of his final proof. That he testified falsely in making his final proof. (P. 292 Rec.) November 18, 1893, the Commissioner directed a hearing upon the questions raised by the contest (p. 259 Rec.), and February 24, 1894, denied

the motion to review the order directing a hearing upon the contest of Hill. (P. 260 Rec.)

In April, 1894, a hearing was had before the local land officers, and on the 9th day of August, 1894, they made their report, in which they stated that the two questions to be passed upon were: First—Did Jacobus abandon the land? Second—Was the sale of the land to McCord and McLeod a bar to the offering of supplemental proof? They did not assume to pass upon any other of the questions stated by the Commissioner to be involved in the contest. (The State Supreme Court reach this conclusion.) The local officers stated in their report: "We think all the circumstances from the time at which the conveyance from McCord and McLeod to Jacobus was made, the execution of the mortgage and the evidence of Jacobus himself, show that the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for the benefit of his grantees," and state their opinion as follows: "We are of the opinion, therefore, that Jacobus' supplemental proof cannot be sustained, and that the entry should be cancelled and a preference right of entry awarded the contestant Hill." (P. 215 Rec.)

January 23, 1895, the Commissioner of the General Land Office made his decision and determination in full, reciting the charges made by Hill and prior proceedings. He specifically found the facts for himself from the testimony given upon the contest, cited precedents, determining that the land was reconveyed to Jacobus, so that he could submit his final proof for the benefit of McCord and McLeod; hence the opinion of the local officers was affirmed and the homestead entry and cash entry were held for cancellation. (P. 266 Rec.)

April 28, 1896, on appeal, the conclusion of the Commissioner in holding for cancellation the entry of Jacobus was affirmed. (P. 268 Rec.)

July 26, 1896, a motion to review the previous decision of the Secretary and confirm the entry of Jacobus on equitable grounds, that the case was in all respects the same as the Herbert Augusta case, in which the entry was confirmed notwithstanding premature commutation, was made, which motion was denied on the ground that the entry was not made in good faith and the proof submitted by the entry-

man was fraudulent, and these were the distinctions between the case at bar and the Augusta case, the essence of the decision in that case being the evidence of good faith on the part of the entryman. At the same time a motion was made to confirm the entry under the provisions of the Act of Congress of June 3, 1896, and such motion was denied in and by the same order and for the same reason, namely, the practice of fraud in making proofs. (P. 269 *et seq.* Rec.)

Thereafter, on September 7, 1896, Hill perfected his right of entry, which was allowed on that day, and on the 12th day of January a patent was issued to him. Subsequently Jacobus conveys to McCord, and McLeod also quit-claims to him.

The Act of June 3, 1896, is as follows:

"Be it enacted, by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs and legal representatives, as of the date of such final certificate of entry and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate: Provided, That this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been cancelled when the lands made vacant by such cancellation have been re-entered under the homestead act.

Section 2. That all commutations of homestead entries shall be allowed after the expiration of fourteen months from the date of settlement.

Section 3. That all acts and parts of acts in conflict with any of the provisions of this act are hereby repealed.

Section 4. That this act shall take effect and be in force from and after its passage and approval.

Approved June 3, 1896."

The allegations of the complaint as to the mistake of law made by the Secretary of the Interior, are in words and figures following, to wit: "Upon said motion for review (referring to the motion made to review his former decision), the Secretary of the Interior by mistake of law erroneously decided and held that the said Jacobus was not within the Act of June 3, 1896, for reasons set forth in the decision of the Assistant Commissioner of the General Land Office of January 23, 1895, hereinbefore particularly set forth, and that in and by said decision said Secretary, by mistake, erroneously so held and decided that because the claimant Jacobus was unable to make supplemental proof after his final or commutation proofs had been made, he was thereby excluded from the provisions of said Act of June 3, 1896, when on the contrary it is the true intent and meaning of such Act of June 3, 1896, to allow commutation homestead entries to be made, provided the claimant was entitled to make the same at the time of submitting his commutation final proofs, which was afterwards held by the Department to be premature, and the construction of said Act of June 3, 1896, in no manner depends on facts occurring after the submission of commutation proofs in any case. That it never was held by any of the officers of the General Land Office or the local land office, or of the Department of the Interior, in any of said proceedings, that the said Jacobus was not an entryman in good faith of the said land, or that there was any defect or fraud whatever in his entry of said land or in his final or commutation proof thereof, but the only fact which was ever held against said Jacobus in said proceedings was that by reason of having conveyed said land after he had obtained said final certificates, to the plaintiff and said McLeod, he was precluded from making supplemental proof as required by the Commissioner of the General Land Office, which supplemental proof became

immaterial and unnecessary under the Act of June 3, 1896; that said office decision of January 23, 1895, did not find any fraud or lack of good faith on the part of said Jacobus, but simply found and held that because he had sold the land after receiving his final certificates, that he could not make supplemental proof, and the plaintiff submits that the decision of January 23, 1895, was correct, inasmuch as said Jacobus did not then own the land, and if the title of said Jacobus depended entirely upon his ability to make such supplemental proof, he or his grantees could never have obtained a patent for said land, but inasmuch as it was found and determined by the Land Department, through all the stages of said preceedings, that he was an entryman in good faith, that his entry was entirely satisfactory down to the time of making final proofs, he was therefore brought clearly within the Act of June 3, 1896, and the Secretary of the Interior by error of law improperly and unlawfully excluded him from the benefits of that Act." (P. 51 Rec.) No other or different mistake is alleged.

Hill demurred to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action—which demurrer was sustained by the Circuit Court. McCord appealed from the order sustaining the demurrer to the Supreme Court, which Court reversed the order of the Circuit Court.

The decision of the Supreme Court assumed, though it did not appear in the complaint, that in the affidavits of McCord and Jacobus, called supplemental proofs, "it was not disclosed that Jacobus had sold the land and abandoned his residence upon it, and on trial those proofs were held to be fraudulent, and he refused the land, although the final cancellation of the patent had not then taken place (p. 21 Rec.), and the Court reached the conclusion that in the decision of the Secretary of the Interior in which he characterized the proofs made by Jacobus as fraudulent, and charged Jacobus with the practice of fraud in making proofs, he referred to this concealment of the transfer of the land as the fraud, and the supplemental proofs by reason of such concealment therefrom as the proofs, the making of which was the practice of fraud, and that the Secretary did not pass on the question of fraud in the commutation

proofs of September, 1892. That fraud in the making of such supplemental proofs could not, under the Act of June 3, 1896, have any effect upon the right of Jacobus to the land. The complaint averred there was no fraud; the Court determined there was fraud.

It was also determined that Hill was not estopped from claiming title by reason of his relinquishment upon the first contest to the United States. A motion was made in behalf of Hill for a rehearing, and a rehearing was ordered, but providing that reargument should be confined to the questions,—

1. Whether, as conditions precedent to confirmation under the Act of June 3, 1896, application to the Commissioner of the General Land Office, and proof of the necessary facts before him and findings thereon by him, or either of those proceedings, was made essential.

2. Whether the six months' actual residence in good faith prior to commutation, required by said Act, was required to be subsequent to the date of entry.

3. Whether at the date of the Act of June 3, 1896, Jacobus' entry had been cancelled and the land had been reentered by the homestead act.

4. Whether the rights now claimed by Hill are such that he is estopped to set them up against the plaintiff below, McCord. (P. 27 Rec.)

Upon such rehearing the Court determined the first two questions in the negative. The third it declined to consider, so far as the question of cancellation was involved, withdrawing the statement in the former opinion in respect thereto, but did determine that the land had not been reentered at the date of the passage of the Act of June 3, 1896, within the meaning of the terms of that Act. The fourth it determined it was unnecessary to consider. (P. 28 Rec.)

Subsequently Hill made, filed and served his answer to said complaint (p. 54 *et seq.* Rec.), admitting the making of the several orders and decisions of the officers of the Land Department, recited at length in the complaint, the making of the deeds and mortgages between McCord, McLeod and Jacobus, denying that Jacobus ever established a residence upon said land; that he had been in continual possession and occupancy of the land from February 4, 1891, to September 20, 1892; that he made due proof of his entry, settlement

and improvement of the land on September 20, 1892; that by his proofs he showed more than nineteen months' occupancy, possession and improvement of said land. That he was, in December, 1892, the equitable owner of the land; that he made the statement to McCord and McLeod, stated in the complaint upon which the allegation of estoppel is based, and that such statement was relied upon; that the decision of the Commissioner of May 15, 1893, was erroneous, and that the certificate of entry remained uncancelled after the 28th day of April, 1896.

The answer also denied that the witnesses sworn upon the contest did not give any testimony except as to possession and occupancy and improvement of the land, and that they did not give testimony tending to impeach the good faith of the entry of said Jacobus. All the testimony is set forth in and made a part of the answer, and stipulated in evidence at the trial. The answer further contained denials of the conclusions set forth in the complaint, also denied that the Secretary of the Interior made any mistake of law in his decision of August 4, 1896, and that the construction placed upon it by the pleader was correct; also denied that the Land Department, throughout all the stages of such proceedings, determined that said Jacobus was an entryman in good faith, or that his entry was satisfactory to the time of making his final proofs. The answer also contained a general denial of that which was not expressly admitted.

The application for homestead entry was set out, including the affidavit of Jacobus (pp. 59 and 60 Rec.), and his final and commutation proofs, which were not stated in the complaint (p. 60 *et seq.* Rec.), with an allegation that such proofs were false, stating the particulars wherein they were false. A rule of the Department under Act of June 3, 1856, was also set out. (P. 224 Rec.) The answer also alleged that McCord was not a purchaser in good faith.

The action came on for trial in the Circuit Court upon the issues thus framed, the principal issues being: 1—The proper construction of the Act of June 3, 1896, which was only formal, as the Supreme Court had determined it. 2—The proper construction of the decision of the Secretary of the Interior which the Supreme Court had determined upon the allegations of the complaint, which were admitted by

the demurrer; which decision was not controlling, however, as the supplemental proofs put in evidence disclosed that the facts which the Supreme Court assumed in its former opinion were concealed, to wit, the conveyance of the land to McCord and McLeod and the mortgage back, were fully set forth in such proofs. 3—Whether McCord was a purchaser in good faith. 4—Whether Hill was estopped from claiming the land and his title inured to McCord.

The Circuit Court made its findings of fact and conclusions of law (p. 226 Rec.), most of which relate to questions not at issue before the Court and by which the Court sought to determine for itself whether the entry on the part of Jacobus was in good faith, and also whether fraud was practiced in making his final proofs. Finding also that there was fraud in the making of the supplemental proofs, in that "it did not appear therein that the land was reconveyed by McCord and McLeod to Jacobus for the purpose of enabling him to make proof for their benefit, and that it did not appear therein that he went back upon the land for the purpose of making proof in their interest or for their benefit. (P. 231 Rec.) The trial court also found that Hill made the statement alleged in the complaint upon which the claim of estoppel is based.

As conclusions of law, that Jacobus, by means of the several proceedings, received a complete equitable title to the land. That the entry of Jacobus related back to the date of his settlement upon the land in January, 1891. That his commutation was in all respects according to law. That no supplemental proofs were necessary or required by law. That the conveyance back by McCord and McLeod to Jacobus and the attempted making of supplemental proofs were altogether unnecessary and immaterial. That under the Act of 1896, any concealment or fraud in the supplemental proofs was immaterial and of no consequence. That the decision of the Secretary of the Interior in refusing to confirm the title of Jacobus under the Act of 1896 was erroneous by reason of his mistake of law. That fraud in the making of said supplemental proofs would not prevent Jacobus from receiving title under said Act.

That the defendant (Hill) is estopped from making any claim or asserting any title to the land in question as against the plaintiff.

That the plaintiff is entitled to judgment, etc., and a conveyance.

Exceptions were duly made and filed to said findings and conclusions. (P. 280 Rec.)

Judgment was entered in accord with the findings. (P. 234 Rec.)

The defendant in that action, Hill, appealed from said judgment, and the said appeal came on for argument before the Supreme Court, which rendered its judgment affirming the judgment of the Circuit Court. The Court, in its opinion, state (297 Rec.) that the decision upon the former appeal became the law of the case except so far as the situation was altered by proof. That the propositions decided upon the former appeal were that the officers of the Land Department, in granting Jacobus the privilege of preemption entry in commutation of his previous homestead entry, decided that his entries were made in good faith. (That is, the act of granting the privilege of preemption entry was a decision that the entry was in good faith.) That he had resided upon the land in compliance with the homestead laws for at least six months prior to said commutation, and that his final proofs, upon which the preemption entry was allowed, were not fraudulent. (These proofs were not in the complaint, nor was their contents in any manner stated or referred to.) That the Secretary of the Interior, nor the Land Officers, had never reversed such findings of fact, and that the rejection of the supplemental proofs went upon the ground of fraud occurring therein. That such fraud was no obstacle to Jacobus' right of confirmation. Hence that the refusal of such confirmation and the allowance of Hill's entry and subsequent patent were all by mistake of law, and conferred upon Hill the empty legal title only, which the United States held in trust for Jacobus, who held the full equitable title under the Act of 1890. "Hence our former ruling, that the facts of good faith entry, six months' residence and honest final proofs had been decided to exist by the land officers, must control now." The Court admits that the assumption of concealment of facts in the supplemental proof in the former opinion was a mistake and untrue in fact, but notwithstanding, it is stated that "examination now made of the record of the contest shows

that the fraud which was pointed out in the opinion of the local officers, the decision of the Commissioner and of the Secretary, *was in attempting to impress those tribunals with the idea that he, Jacobus, had in good faith* re-acquired the title to the premises for the purpose of making the premises his home, and not for the forbidden purpose of acquiring title for someone else. The record discloses now, as on the former appeal, that there was in the supplemental proofs concealment of a purpose which the land officers decided to exist, and that such concealment was by them decided to constitute a fraud."

The Court admits that its statement in the former opinion that "no suggestion was made in Hill's contest affidavit, that the commutation proofs were characterized by any fraud or fraudulent practice, and no issue as to the *bona fides* of Jacobus in tendering those proofs was presented," is contrary to the fact, and state an issue was raised by which the land officers could have inquired or decided with reference to fraudulent practices in the commutation proofs, but determine that such issue was not determined by the local land officers upon such contest, and hence was not determined either by the Secretary of the Interior or the Commissioner of the General Land Office, and the Act of granting the commutation entry by the local land officers stands as the evidence and the only evidence of a decision that there was no fraud practiced in making the commutation proofs, because, as the opinion states, they must necessarily have decided there was no fraud in granting the certificate, and hence these facts entitled Jacobus to confirmation and patent under the Act of 1896.

In the opinion no reference is made whatever to that part of the decision of the Secretary of the Interior denying the motion for review (p. 272 Rec.) which states: "The very essence of the decision (Herbert Augusta, 21 L. D. 200) confiming the entry in that case, was the evidence of good faith on the part of the entryman. The evidence in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent."

The Court determines that Hill was estopped from claiming the land as against McCord; that on this ground as well, if their determination of the other question is incorrect

Hill must be charged as trustee of the whole title of McCord and decreed to convey it to him.

The Court disaffirms the finding and conclusion of the trial Court, in substance, that Jacobus was entitled to commute at the time he made his final proofs. The Court affirms the finding that McCord was a purchaser in good faith.

The questions involved have been brought to this Court for review by Writ of Error.

Questions Involved.

1. The construction of the decision of the Secretary of the Interior, of date, August 4, 1896.

Whether he there determined that Jacobus was excluded from the benefit of the Act of June 3, 1896, solely by reasen of his inabilty to make supplemental proof, on account of his sale of the land.

Whether he referred to the commutation proofs, or to the so-called supplemental proofs, in stating that his proofs were fraudulent and the practice of fraud in making proofs.

Whether he there determined that the entry of Jacobus was not made in good faith, and if he referred to the supplemental proofs, was his conclusion a mistake of law?

2. Whether the defendant here can avail himself of a mistake of law other and different from the one alleged, and especially where in his complaint he expressly negatives the mistake now urged.

3. The construction of the Act of June 3, 1896. Whether Jacobus was within or brought himself within the provisions of that Act.

4. Whether facts entitling Jacobus to a patent not only existed but were decided to exist by the Secretary of the Interior, and his decision was predicated upon a mistake of law to the facts already decided to exist.

5. Whether it was within the power and duty of the Secretary of the Interior to refuse a patent for fraud practiced in making supplemental proofs.

If the defendant here is precluded from insisting upon any other mistake than the mistake alleged in his complaint, then of course the other questions stated are not involved.

6. Was the plaintiff in error precluded by the doctrine of estoppel from acquiring a patent to the land, and if so, could the defendant avail himself of that estoppel to ac-

quire title through such plaintiff, especially in the absence of a showing, that but for the mistake of law on the part of the Secretary of the Interior he or his grantees would have been entitled to and would have received such patent.

7. Whether the decision of the State Supreme Court upon demurrer could establish the law of the case, it not being the highest court qualified to pass upon the question.

Specification of Errors.

1. The Supreme Court of the State of Wisconsin erred in its construction of said Act of June 3, 1896,—

a. In determining that application could be made to the Secretary of the Interior to confirm a commutation entry, and especially where made upon the original records, and without an affirmative showing of the conditions expressed in said Act.

b. In determining that the six months' actual residence in good faith by the entryman on the land required to be made to appear to the Commissioner of the General Land Office, was not the six months immediately preceding the act of commutation, but six months' actual residence at any time after settlement upon the land.

c. In determining that the words "re-entered under the homestead act," being the concluding part of the proviso in the said Act of June 3, 1896, meant only an entry allowed of record and did not include the preference right of entry awarded upon contest to the contestant.

2. The circuit court erred in determining that there was not, on June 3, 1896, or at any time prior to the entry made by Hill on September 7, 1896,—

a. Fraud practiced by Jacobus in making his commutation proof.

b. Any adverse claimants to the land, or of any entry, whose rights originated prior to the making of such final commutation proofs.

c. That there was no other reason on June 3, 1896, or subsequent, why the title to said lands should not vest in Jacobus as provided by his said certificate of entry.

d. That there was more than six months' actual residence by Jacobus on the land prior to the making of his commutation proofs of September, 1892.

e. That the land was not re-entered by Hill or any other person until September 10, 1896.

f. That the preference right of entry awarded Hill was not within the proviso of the Act of June 3, 1896,

and it was error in the Supreme Court not to have reversed or disapproved of such findings, and to have determined either they were irrelevant and incompetent, or, if otherwise, that there was no evidence whatever in support of the five first mentioned, and that, as to the sixth, it was an erroneous construction of the law.

3. The Court erred in determining that the entry of said Jacobus and his proofs were such as to bring his entry within the provisions of the Act of June 3, 1896, and that his said entry and proofs entitled him to confirmation of his entry under said Act.

4. The Court erred in its construction of the decision of the Secretary of the Interior of date, August 4, 1896, in determining that in and by said decision of the Secretary, in his statement therein, to wit, "The evidence in the case at bar clearly shows that the entry was not made in good faith and the proofs submitted by the entrymen were fraudulent," referred only to the supplemental proofs, so called. That the Secretary referred soley to the supplemental proofs in stating in said decision, "It is likewise impossible to confirm the entry under the provisions of the act of June 3, 1896, for the same reason, namely, the practice of fraud in making proofs," and not to the original or commutation proofs.

5. The Court erred in determining that any mistake of law whatever was made by the Secretary of the Interior in his decision of August 4, 1896, of the motion of Jacobus to review the previous decision of the Secretary or in deciding the motion to confirm the entry of Jacobus under the Act of June 3, 1896.

6. The Court erred in determining that the register and receiver of the local land office, by the act of accepting and allowing the commutation proofs of Jacobus and issuing to him the receipt and the certificate of entry, found that Jacobus had resided upon said land continuously from the 4th day of February, 1891, had cultivated and improved the same, and *fully complied with all the requirements of the law in regard to the same as a homestead entry*, and that such determination had never been questioned or reversed by either the Commissioner or the Secretary, and hence from

said act alone, Jacobus was equitably entitled to a patent, notwithstanding the decision of the Secrectary to the contrary.

7. The Court erred in determining, as stated in the last opinion, that they so decided in a former one, that the officers of the Land Department, in granting Jacobus the privilege of preemption entry in commutation of his previous homestead entry, decided that his entries were made in good faith, and that his final proofs upon which the preemption entry was allowed, were not fraudulent, and in determining further that this finding of fact had not been reversed.

8. The Court erred in determining that there was fraud and concealment in the supplemental proofs.

9. The Court erred in determining that Hill would be estopped from obtaining title or patent to said lands by his acts prior to the initiation of said contest, in case their determination of the other issues were incorrect and that the title would, by reason of such estoppel, be held in trust for the defendant here, McCord.

10. The Court erred in affirming and determining as to such estoppel upon oral evidence.

11. The Court erred in assuming and determining that a mistake of law was made by the Secretary of the Interior, other and different from that alleged in the complaint, when in fact no such mistake of law as alleged in the complaint was made, or determined to have been made, nor was the patent denied the said Jacobus upon the ground stated in said complaint.

12. The Circuit Court erred in determining for itself what were the facts relating to the entry, settlement and residence and improvements upon the land by Jacobus, from the evidence and record in the case, and in predicating its judgment thereon, instead of upon the facts as determined by the Commissioner of the General Land Office or Secretary of the Interior appearing in their official decisions, among others, the following, to wit:

a. That it appeared from the testimony taken upon the contest instituted by Hill, that Jacobus had resided upon the land with his wife, was there most of the time from the time of his settlement in February, 1891, until the sale of the land to McCord and McLeod in December, 1892.

b. That Jacobus had no other home.

c. That he was necessarily absent for the purpose of earning a living for himself and wife and money with which to improve his homestead.

d. That he fully complied with the law as to such residence, occupation and improvement of said land.

e. That the commutation proofs presented by Jacobus Sept. 20, 1892, were truthful and in no manner fraudulent, and it was error for the Supreme Court, exceptions having been duly taken to such findings, to affirm the same, or if not expressly affirmed, not to have disapproved such findings. It was also error on the part of the Supreme Court, if the question was one proper for their determination, not to have determined that Jacobus had not complied with the law as to residence, occupation and improvement of the land, and that the commutation proofs submitted by Jacobus were in fact false and fraudulent.

13. The Court erred in determining that the said Jacobus had a complete equitable title to the land which inured to the defendant McCord, and determining that said defendant was entitled to judgment and decree according to the prayer of his complaint, and in awarding and affirming the judgment in the action in favor of the defendant and against the plaintiff in error.

14. The Court erred in determining that the questions passed upon by the Supreme Court upon demurrers, were *res adjudicata* upon the final hearing upon the merits.

15. The Court erred in determining that the complaint stated a cause of action and reversing the order of the Circuit Court sustaining the demurrer.

16. The Court erred in determining that McCord was a purchaser in good faith.

Argument.

There were three decisions of the State Supreme Court upon questions involved or asserted to have been involved in the action. The first two were rendered in determining the sufficiency of the complaint upon appeal from an order sustaining a demurer thereto. By the last decision it is asserted that matters presented upon the appeal from the judgment were *res adjudicata* by reason of the former decisions. Some of the questions so adjudged are specifically

stated, others are left to inference, and confusion arises from the fact that the specific ground upon which the former decisions were based, to wit, that of concealment of the fact of conveyance by, and reconveyance to Jacobus of the land, was concealed in the supplemental proofs so called, appeared upon the second appeal to have been untrue and contrary to the fact, and the Court then changed completely from the position first assumed. It had also determined that the local land officers had decided in their report upon the contest that the entry was in good faith, that the Commissioner had approved of the opinion thus declared and the Secretary had affirmed it, and that the fraud stated in the decision of the Secretary related to concealment of the facts in the supplemental proofs. In and by the last decision it is determined that the local land officers did not pass upon that question, though the issue was present; that the Commissioner did not pass upon it. That it has never been determined, except by the mere act of the local land officers in issuing the certificate upon commutation, no reference being made to that part of the decision of the Secretary which expressly states that the entry was not made in good faith. It seems quite difficult to ascertain in view of this change of position, to what extent the opinions and decisions first rendered are applicable, and to formulate specific statements of error. Out of abundant caution it may be, that errors are alleged that are not important for consideration by this Court.

The first subject involved is the proper construction of the Act of June 3, 1896, and the rulings of the State Court in respect thereto, specified as errors (1, 2 and 3, specifications.) The defendant's right is claimed solely under the provisions of that Act. This act is set out in full in the printed transcript, page 49, and in this brief, pages 4 and 5.

The first proposition is, whether there is required an affirmative showing on the part of the entryman of the conditions there expressed, or whether the previous record is sufficient of itself to confirm the entry. In other words, whether the law is self-executing. The language is, "When it shall appear," not "When it shall have appeared." I have classified the conditions as follows:

1. That an error has heretofore been made by the

officers of the local land office in receiving premature commutation proofs, under the homestead laws.

2. That there was no fraud practiced by the entryman in making such proofs.

3. That final payment has been made.

4. That a final certificate has been issued to him.

5. That there are no adverse claimants to the land whose rights originated prior to such final proofs.

6. That no other reasons exist except the making ofsu ch premature commutation.

7. That there was at least six months' actual residence by the entryman prior to such commutation.

It would seem that the record itself would determine the first, third and fourth conditions, these being the factsof premature entry, final payment and issue of the certificate. The other conditions would not necessarily appear in the original record, to wit, that fraud was not practiced by the entryman in making his commutation proofs. That there are no adverse claimants whose rights originated prior to the making of such proofs. That no other reason exists why the title should not vest in the entryman, except the premature commutation, and that there was at least six months' actual residence by the entryman, prior to such commutation, and hence it would seem absolutely required that these matters should be made affirmatively to appear. How could the Commissioner determine whether fraud had been practiced in making proofs from the record itself? If fraud appeared upon the face of the proofs, there certainly would have been no commutation certificate or entry, and hence the Act would have no application. The position of the State Court seems to have been that, notwithstanding the proofs were fraudulent, as in this case, such fraud not appearing on the face of the proofs, confirmation follows as a matter of course. Fraud would only appear by extrinsic evidence, and if it be true that the Commissioner or Secretary must examine the record to ascertain the character of the final proofs, then in the case at bar such proofs, in connection with the evidence upon the contest, would disclose and did disclose that the proofs were fraudulent.

The contention on the part of the plaintiff in error is that this Act provides a new and independent proceeding before the Commissioner (not the Secretary of the Interior),

upon new proofs to be presented to him, in the light of all the conditions existing up to the date of such proceeding. That the required conditions must be made to appear affirmatively as conditions precedent. That fraud in making such proofs must be negatived by evidence of good faith; that six months' actual residence from and after the date of the entry and prior to such commutation must be shown.

Such seems to have been the judgment of the Land Department. A circular was issued therefrom (26 L. D. 54) construing said Act, wherein it was stated: "Where the cash certificate in a case coming within the provisions of the statute has been cancelled, it will be necessary for the parties in interest, if they desire a reinstatement of the same and the confirmation of the entry, to file in the proper land office an application for such action. You will forward the application to this office for consideration, accompanied by a full report as to the status of the land embraced in the entry, the confirmation of which is desired." This was to enable the Commissioner to know the status of the land at the time, whether other parties had or claimed rights therein; whether a contest might be pending so as to enable him, among other things, before concluding such parties, to order a hearing and investigate, if an investigation had not already been had.

It is respectfully urged that the Act in question gives a permissive right to an entryman who had made an honest mistake of premature commutation, of restoration to his original rights, lost by such mistake, upon his establishing to the satisfaction of the Commissioner certain prerequisites, among which are good faith in making his final proofs, the absence of any adverse meritorious claimant whose rights will be prejudiced; actual residence upon the land in good faith for six months immediately prior to his commutation, and then if there are no other reasons which in equity ought to preclued the restoration of his entry, the Commissioner may confirm the same. A sufficient reason to deny confirmation might be the fact, that upon a contest had, a right of entry had been awarded another, or that it appeared upon such contest, the entry was not in good faith or the proofs were fraudulent. At least the Commissioner must have the opportunity of determining whether sufficient reasons exist for refusing confirmation. The Act

merely permits an appeal to the equitable discretion of the Commissioner.

The proviso in said Act relates to another class of cases. As we argue later, such cases are not within the provisions of the Act at all. The plaintiff in error contends, further, that the discretion provided by the Act is confined to the Commissioner. It begins and ends with him, and is independent of that general discretion and supervision vested in the Secretary of the Interior, which can be originally exercised.

Six months' actual residence prior to commutation. Our contention is that the six months' actual residence must be subsequent to the date of entry.

Previous legislation and statutes in force at the time of the passage of the Act may be exmined in determining this question. Section 2301, Revised Statutes 1878, provided for making proof of settlement and cultivation upon commutation as provided by law granting preemption rights. Such statute required the erection of a house, etc., and further provided that rules and regulations should be promulgated by the Land Department. Such Department promulgated regulations, one of which provided for six months' actual residence as evidence of genuineness of settlement. (Rules L. D., issued July 11, 1899, page 262.) Subsequently the right of preemption was taken away entirely and commutations were made upon six months' actual residence after entry.

The Act March 3, 1891, amended section 2301 so as to read as follows: "Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of section 2289 from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen *calendar months from the date of such entry* and obtaining a patent thereof, upon making proof of settlement and of residence and cultivation for such period of fourteen months."

The uniform decisions of the Land Department after the passage of such Act were to the effect that commutation could not be made until fourteen months after *date of entry*, and was applied to the entry of Jacobus, who commuted in about two months after the date of his entry. The purpose and effect of such act was to extend the time from six

months after date of entry, as construed and applied by the Department, to fourteen months.

Such was the state of the law until the Act of June 3, 1896. That Act provides, "That it shall appear there was at least six months' actual residence in good faith by the entryman *prior to such commutation.*" The plain intention of this provision was to restore the period of actual residence prior to commutation as it existed prior to the amendment of March 3, 1891 (premature commutations having been allowed in ignorance of that Act), where commutation had been made, and thereafter in new cases, by section 2 of said Act, to make the fourteen months commence from date of settlement instead of date of entry.

Such is the construction placed upon this provision of the Act of 1896 by the Land Department. In the circular hereinbefore referred to (26 L. D., 544) it is stated with reference to section 2: "Constructive residence from date of entry will be recognized where settlement is made within six months after allowance of the filing of the entry. The party establishing his residence, the whole of such six months will be allowed, and not merely from the day of actual residence." This evidently in conformity to the provisions of the Act of May 14, 1880, sec. ; Revised Statutes. Jacobus' commutation was in about two months after date of entry.

However, it never appeared to the Commissioner or Secretary that there was six months' *actual* residence upon the land by Jacobus prior to commutation, either before or after allowance of his entry. On the contrary, it appeared to the Commissioner and the Secretary as well, that Jacobus had not at any time an actual residence upon the land, and it is so expressed in the decision of the Commissioner of January 23, 1893, wherein he states: "He (Jacobus) was absent nearly all the time, making an occasional visit on the Sabbath day. His wife stayed (not resided) on the land a part of the time." Constructive residence would not satisfy the law.

It is therefore evident that in this respect Jacobus was not within the provisions of the Act.

Cancellation of Entry.

The State Court declined to pass upon the question whether the entry of Jacobus was cancelled by the final

decision of the Secretary of the Interior, April 28, 1896, saying it was a question properly for the Federal Courts.

The Act of 1896 contains the following proviso: "Provided, that this Act shall not apply to commutation and homestead entries on which final certificates have been issued and which have heretofore been cancelled, when the lands made vacant by such cancellation have been re-entered under the homestead Act."

The decision of the Commissioner was that the certificate was held for cancellation. Evidently so held for the purpose of appeal. The decision of the Secretary upon appeal confirmed that of the Commissioner. This was the final act. It operated to cancel the entry to all intents and purposes without further act. Such has been the uniform decisions of the Land Department.

Land Decisions, Vol. 6, page 563.
" " " 7, " 163.
" " " 19, " 547.
" " " 20, " 191.
" " " 22, " 77.

Such being the established rule and practice of the Land Department, the presumption is that Congress, in enacting the statute in question, used the word "cancelled" in the sense so long given to it by such Department.

Hawley v. Diller, 178 U. S., 487-488.
United States v. Philbrook, 152 U. S. 52.
United States v. Johnson, 124 U. S. 253.
United States v. Alabama, 142 U. S. 621.

Was the land re-entered by the Homestead Act?

The report of the local land officers (p. 215 Rec.), August 9, 1894, was that "the entry of Jacobus should be cancelled and a preference right of entry awarded the contestant Hill." This opinion was affirmed by the Commissioner (p. 217 Rec.), and the conclusion of the Commissioner was affirmed by the Secretary, April 28, 1896. (P. 219 Rec.) Jacobus, by delays and appeals, prevented the entry from being formally allowed until September 7, 1896.

The exact question is, whether the allowance of a preference right of entry to Hill in August, 1894, in connection with the subsequent proceedings of the Department, the

allowance of his entry on September 7, 1896, and the subsequent issue of a patent to him, constituted, within the meaning of the proviso of the Act of June 3, 1896, a re-entry under the homestead laws.

Again we refer to previous legislation. Section 3 of the Act of May 14, 1880, reads as follows: "That any settler who has settled or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws, to put their claims on record, and his right shall *relate back* to the date of settlement, the same as if he settled under the preemption laws."

The Secretary of the Interior, construing this Act, states: "That it conferred a special power upon the successful contestant, namely, the right, as against all others, to enter the tract in dispute upon the successful termination of the contest, thereby securing to him a reward for the *time and money* spent in such contest."

4 Land Decisions, 580.

This accords with the doctrine of this Court, where it is stated: "The party who takes the initiatory steps in such cases, if followed up to a patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act and cuts off all intervening claims."

Shipley v. Cowan, 91 U. S. 330,

The initiatory step is taken when the contest is initiated.

4 Land Decisions, 580.

The Land Department gives construction to the word "re-entered" where used in a similar act. The second section of the Act of June 15, 1880, provides: "That persons who have heretofore, under any of the homestead laws, entered lands properly subject to such entry, * * may entitle themselves to such lands by paying the government price therefor. * * *Provided*, this shall in no way interfere with the rights or claims of others who may have *subsequently entered* such lands under the homestead laws."

It was stated: "It has been uniformly decided by this Department, that the right of purchase under said section depended upon three conditions: 1—That the entry was made prior to June 15, 1880; 2—That the land entered was properly subject to entry; and 3—That the land has not been subsequently entered or *a prior right of entry has not been subsequently acquired by some other person.*

4 Land Decisions, 463. Citing five prior cases.

Independent of any statute, the doctrine of relation would seem to be applicable. The application to enter being a legal one at the time, was, while pending, equivalent to an actual entry. The actual allowance of an entry deferred relates back to the inception of the right. Hence, when the entry of Hill was actually allowed, which could not be until the contest proceedings were concluded and it was finally determined the lands were vacant, such entry related back to 1894, and such date, we respectfully urge, is the date of entry within the meaning of the proviso of the Act of 1896. The land became vacant April 26, 1896, the date of the final order cancelling the Jacobus entry. Hill's right at that time was not only a preference right, but the only right. The rights of Jacobus, if any, became extinguished. Thereafter his right, if any, depended solely upon the provisions of the Act of 1896. That Act, we contend, was intended solely to grant relief to an original entryman, only where no other valid, subsisting right had intervened. Hill had conducted the contest through all the departments, had paid all the expenses, and had succeeded. It ought not to be presumed the legislative intent was to deprive him of the fruits of his efforts.

Construction of the decision of the Secretary of the Interior of date August 4, 1896

The next question involved and embraced in the specifications of error is, the construction of the decision of the Secretary of the Interior, of date August 4, 1896. (4th, 5th, 6th, 7th and 8th Specifications of Error.)

The contention on the part of the plaintiff in error is, however, that the mistake as found by the State Court was one of fact and not of law? That the question of a purchaser, or an entry in good faith is one of fact and not of law.

Gordon v. Bonesteel, 180 U. S. 362.

Another rule is that equity does not interpose when the alleged mistake relates to a matter of fact, concerning which the officers of the Land Department have drawn wrong conclusions.

Lee v. Johnson, 116 U. S. 48.

The Secretary of the Interior determined that the entry of Jacobus was not in good faith. That his proofs were fraudulent. That he practiced fraud in making proofs. These were questions of fact, not of law.

There can be no question as to the proper construction to be given to the language of the Secretary in his final decision of August 4, 1896, if such language be given its ordinary and well-recognized meaning. When it said that an entry is made in bad faith or the reverse, the meaning is absolutely clear and well understood. When it is said that proofs are fraudulent, it ordinarily means such proofs as are before the officer, and which the law under which his determination is to be made, requires him to determine. It is equally clear that when such officer determines that an entry is in bad faith, and states in the same connection that the proofs are fraudulent, he is presumed to refer to such proofs as were made to complete the entry, as an entry, made in bad faith, if allowed, must necessarily have been allowed upon proofs which were fraudulent.

The construction placed upon such decision by the State Court is one of conjecture merely, at variance with the ordinary meaning of the words, not sustained by a scintilla of evidence. It is hardly consistent with the declaration of that Court, "that it must appear clearly and without substantial doubt, that the facts entitling Jacobus to the land not only existed, but was decided to exist by the executive officers of the Land Department."

The general rule for the construction of statutes is that in ascertaining the legislative intent, resort must be had to the language used. If that is plain and unambiguous, interpretation is not allowable.

Ogden v. Glidden, 9 Wis. 46.
Gilbert v. Dutroit, 91 Wis. 661.

Where a law is expressed in plain and unambiguous terms,

whether those terms be general or special, the legislature should be intended to mean what it has plainly expressed.

Lake County v. Rollins, 130 U. S. 662.

To get at the thought or meaning expressed in a statute, the first resort in all cases is to the natural signification of the words in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning apparent upon the face of the instrument must be accepted, and neither the Courts nor the legislature has the right to add to or take from it.

Newall v. People, 7 N. Y. 997.
Lake County v. Rollins, 130 U. S. 662.
Battles v. Hamlin, 22 Wis. 669.

The motion to review the former decisions was based upon the statement that the case at bar was in all respects similar to the Herbert Augusta case, page 269 Rec., 21 L. D. 200. The Secretary held that "the very essence of the decision confirming the entry in that case was the evidence of good faith on the part of the entryman. The *evidence* in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent, as fully set out in your office decision of January 23, 1895."

It thus appears that his attention was directly called to the evidence given upon the contest. It was also directly called to the question of good faith of the entry, and necessarily was called to the question of the proofs submitted to complete the entry. If the entry was in bad faith, the proof was necessarily fraudulent. He determined it was fraudulent from the *evidence* in so many words.

The proofs were fraudulent as matter of fact and law. These proofs appear page 60 *et seq.* record. The following questions were contained in such proofs:

Question 5: Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon?

Answer: Wife and myself. Yes, we have. We had no other home but this.

Question 6: For what period or periods have you been

absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Answer: I was absent at different times two or three weeks at a time, earning money to support my family and improve my place. Never was absent exceeding three weeks at any one time, and my wife has always lived continuously on the land.

The decision of the Commissioner to which the Secretary refers contains the following statements: (P. 217 Rec.) "It is shown by the evidence that defendant had a small log house on the land; that it was well finished and well furnished; that he had about two acres cleared; that the improvements were worth about $200. *He did not have any stock of any description, no chickens or other poultry*; that on December 27, 1892, defendant *sold said land* to Daniel McLeod and W. E. McCord for $4,250 *cash*.

On the question of residence, the testimony is very conflicting. Defendant's wife stayed (not resided) on the land a part of the time, and the defendant worked in his barber shop in the town of Iron River, and stayed there *nearly all the time*, working at his trade. *He made occasional visits to the land on the Sabbath day*.

Some of the Evidence upon the Contest to which the Secretary Refers.

Jacobus testifies in the contest proceedings (p. 155 Rec.), in answer to the question, "What time were you on the place during the spring and summer season of 1892?" Answer: "I would go out every Sunday." (P. 142 Rec.)

Again: Was at Superior barbering in 1891. Quit there to start up same business at Iron River last part of April, 1892. This was prior to the time I got my filing. I was on the place on Sundays in January, 1892, but my wife wasn't. I was there every Sunday in February, March, April, May and June. No, I wasn't out there every Sunday in January and February. Of course, I was working at Superior at the time. (Pp. 155 and 156 Rec.) Maybe I was out twice a month in March and April.

My wife was visiting at Chippewa Falls. This was prior to the burning of Iron River village. She went at that time, and again in 1893. This is the time she always goes

to Chippewa. In the winter time. Them months. (P. 161 Rec.)

Mrs. Jacobus testified: In answer to the question, "Just commence the first of the year. State definitely the particular times you were there in 1892?" Answer: I went there Easter, and stayed about a week in Iron River. Then I went to Superior for a few days, and came back and went out on the claim, and I was sick. Then I went on the claim again and stayed there until June. (P. 172 Rec.) I stayed a week on the claim in February, 1892. I went out in the last part of March or April. I disremember just—— And then I was sick with rheumatism. (P. 173 Rec.) I went back the Sunday after the 4th of July. I stayed there then until we proved up. (P. 174 Rec.)

Question: These times you were out there, particularly the six weeks in 1891, how often was Mr. Jacobus out to see you?

Answer: He was in Superior then. He didn't come so often then. He used to come every two weeks, and it has been as much as three weeks. He would come out on Sundays. (P. 178 Rec.)

Such testimony is in direct contradiction of his answers as to continuous residence made in his commutation proofs.

The Commissioner, however, in his decision referred to, went further in characterizing the entry as in bad faith and the proofs as fraudulent. He states: "The case of Alonzo W. Laird is very similar to the one at bar. In that case it was held that, 'one who enters with no intention of establishing residence in good faith and subsequently submits fraudulent final proofs, cannot cure the wrong and acquire title to the land by returning to the same after said proof has been rejected and his entry held for cancellation.'"

Here was an emphatic declaration that Jacobus' entry was with no intention of establishing residence in good faith. The evidence upon the contest showing the sale for $4,250.00 cash and commutation within two months after entry allowed, the fact that Jacobus had made no preparation for a permanent home, the fact that he had not provided a horse, a cow, a pig, not even a chicken, and the fact that he was absent from the land practically all the time, making an occasional visit on Sunday, and that his wife merely stayed on

the land a part of the time, was sufficient to convince him that the entry was not in good faith. The direct question before him, and the only one which was decided by the local land officers, was whether Jacobus should be permitted to make supplemental proofs, in view of the fact he had sold the land, and he directly affirmed their opinion in this respect. He first disposed of the equities, then the law. It was to this part of the decision of the Commissioner the Secretary had reference, where he states, "The *evidence* in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent, *as fully set* out in your office decision of January 23, 1895." It should be kept in mind no supplemental proofs had ever been made, only affidavits presented to the Commissioner showing that it was impossible to comply with the order requiring such proofs as the land had been sold.

In the Herbert Augusta case, application was made to the Secretary by the grantees of Augusta to confirm the entry (not under the Act of 1896; it was prior to such Act) on equitable grounds. That they had purchased the land on the faith of the certificate, and as there was no intervening right, they should be protected. It was also a case of premature commutation. The Secretary in deciding that application uses the following language: "If it is within the scope of the equitable jurisdiction of the Department to protect such transferees without violation of law, I think such protection should be extended."

The purpose was to protect the transferees. The equity was theirs. Acts of the entryman subsequent to his conveyance to them would not impair their equities. The motion to review in the case at bar (see motion, page 220 Rec.) was based upon the decision in the Augusta case. The equities of the transferees was the same in both cases if McCord was a purchaser in good faith. The distinction, however, between the two was as stated by the Secretary, that the entry in the Augusta case was in good faith (as shown by his continuous residence on the land for three years), while in the Jacobus case the entry was not in good faith and his proofs were fraudulent. The affidavits stating why Jacobus could not make supplemental proof, were after the transfer to McCord and McLeod; hence any fraud in

such affidavits or any secret purpose on the part of Jacobus, would not affect the equities of such transferees. How, then, can it be said the Secretary, in referring to proofs as fraudulent, had any reference whatever to such affidavits.

Further: The Secretary at the same time was requested to confirm the entry under the Act of June 3, 1896, and he states: "It is likewise impossible to confirm the entry under the provisions of the Act of June 3, for the same reason, namely, fraud in making proofs." This is in the language of the Act, "and there was no fraud in making such proofs." Entry in good or bad faith is not specifically mentioned in the Act. So the Secretary, after determining the entry was in bad faith, which implied fraud in the final proofs, uses the language of the Act. The Act itself designated final proofs made upon premature commutation. The Act evidently was before him. It cannot be assumed he did not understand its provisions, and that he referred to something not within the Act, and especially when the final proofs were in fact fraudulent. The presumption is that his attention was not only drawn to the requirements of the Act, but to the character of the settlement and entry of Jacobus.

Lee v. Johnson, 116 U. S. 51.

We look in vain to find a single fact, circumstance or expression which sustains the bare assumption or conjecture that the Secretary referred to fraud in the affidavits called supplemental proofs. They were truthful in fact. There was no concealment of facts or of purpose. They are found on pages 261 and 262 of the record. Jacobus states therein the sale of the land to McCord and McLeod. That on the 5th of September, 1893, he secured from them a reconveyance of the title, giving to them a mortgage for the sum he received or was to receive from them. He states abandonment after sale and going back upon the land about February 20, 1893, and that such action on his part was with a view to enable him to make the supplemental proof required to the Land Department. McCord states: "That in making the purchase we paid the full value of the land, and we have made a reconveyance of said title to said land for the purpose of protecting the entryman and his title to said land." Jacobus in his testimony upon the

contest frankly states: (p. 161 Rec.), in answer to the question, "Why was it, after you had made proof on the land, and you believed the proof to be good, and you had sold the land, that you still continued your residence upon it? Ans: For the reason, as I stated, that I sold this land, and if there was such a thing, * * I wasn't going to let the men who bought the land from me be the loser by it. I was going to make him all right. That was the reason, and the only reason."

This testimony was given upon an inquiry whether the reasons stated in the affidavits were sufficient to dispense with supplemental proof, which could not be made. It was in explanation of the affidavits themselves. No secret purpose whatever was concealed. The affidavits without such explanation were equally as frank. They disclosed he had taken a reconveyance so as to enable him to comply with the order of the Commissioner. He gave a mortgage back for the full value, $4250. If his entry was confirmed it was for the benefit of McCord to the extent of $4250, which was the full value of the land.

Reference again to the Herbert Augusta case is important, as it will be observed that Jacobus was attempting to do what the Secretary did do in the Herbert Augusta case, that is, protect the transferees. He exercised his equitable powers as an officer to accomplish that result. The equity is just the same where the motive is the same, whether voluntarily exercised by the party or judicially by a tribunal. Can there be such a thing as fraudulent equity? With these facts before him, and required specially to apply to them the doctrine announced in the Herbert Augusta case, is it reasonable to assume that the Secretary would characterize these affidavits as fraudulent proofs and charge the party with fraud in making them?

Indications of Bad Faith.

The Secretary must be presumed to have knowledge of the laws and rules of his Department. Some of them are here given as sustaining his determination that the entry was in bad faith and the proofs necessarily fraudulent.

A rule of the Department provides, "parties cummuting homestead entries cannot be excused from any cause for failure to live upon and cultivate the land for the required

period. They are not obliged to make proof in so short a time in which commutation is allowed, and when such proof is made, full compliance with the law must be satisfactorily shown."

Circlar General Land Office, July 11, 1899, page 24.

Poverty is not an excuse and is not consistent with good faith in commutation.

4 Land Decisions, 185. *5 Land Decisions*, 448.
3 " " 543. *7* " " 467.
11 " " 497.

Where there is any doubt as to actual and continuous residence, a homestead entry cannot be commuted. In such case the proof of residence must be explicit.

4 Land Decisions, 477.

Offer of commutation proof should receive special scrutiny when made within the shortest possible time.

4 Land Decisions, 347.
5 Land Decisions, 349.

Suppression of material facts taken in connection with the effort to prove up in the shortest possible time while alleging poverty, nullifies all claim of good faith.

6 Land Decisions, 265.

An absence from the land immediately following final proof, setting up housekeeping elsewhere, is an indication of bad faith.

5 Land Decisions, 449.

In determining good faith, fitness of the land as a permanent abode, the period of inhabitancy and the claimant's relation to the land after proof, may be considered.

11 Land Decisions, 450.

Residence is not required or maintained by going upon the land for the purpose of merely complying with the letter of the law.

66 Land Decisions, 248. *8 Land Decisions*, 285-331.
16 " " 22.

The rule is well settled that to establish a residence there must be concurrent with the act of settlement, an intent to

make a home on the land to the exclusion of a home elsewhere.

4 Land Decisions,	276.		*5 Land Decisions*,	179.	
4 "	"	512.	*9* "	"	340.
6 "	"	450.	*16* "	"	22.

The undisputed evidence shows the land in question was in an unbroken forest, heavily timbered with pine, its chief and practically only value. Jacobus planted a few potatoes (p. 141 Rec., pp. 150-151); the total sales amounted to $3.50; and he hired a man to dig them. A little hay was raised (p. 143 Rec.), which was spoiled. He did nothing himself,—even hired his wood cut. He did not even dig a well. (P. 154 Rec.)

It is a general rule that transactions subsequent to final proof are admissible to show the intention of the claimant.

Bennett v. Cravens, 12 Land Decisions, 647.

This Court has stated in a case where the facts were very similar to those in the case at bar: "If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever may be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or proceeding. * * Such party *must in all cases* show that but for the error or fraud or imposition of which he complains, *he would be entitled to the patent*. It is not enough to show that it should not have been issued to the patentee."

Lee v. Johnson, 116 U. S. p. 50.

If this rule is applied here, it must be determined not only that the evidence fails to show that Jacobus was entitled to a patent, but that it conclusively appears therefrom that if a patent had been issued to him it would have been the result of fraud in his entry, and fraud in his final proofs, because the evidence discloses beyond any controversy, that both were fraudulent.

Ground of Decision of State Court.

The last decision of the State Supreme Court was based upon three propositions: 1—That the reference by the

Secretary in his opinion to fraudulent proofs and practice related to supplemental proofs; 2—That the local officers in granting the commutation certificate, by that act, determined the proofs were not fraudulent, and the entry was in good faith, which determination had not been reversed; 3—That Hill became a trustee for McCord by reason of an estoppel.

The first of these propositions we have discussed. With respect to the second, it is sufficient to state that the decision of the Commissioner of January 23, 1895 (p. 217 Rec.), states in language that cannot be misunderstood, that the entry was in bad faith. He states, "the case is similar to the case of Alonzo W. Laird, and that in that case it was held that one who enters with no intention of establishing residence in good faith, and subsequently submits fraudulent final proofs," etc.

The Secretary of the Interior on the motion to review states that "the *evidence* in the case at bar clearly shows that the entry was not made in good faith and the proof submitted by the entryman was fraudulent." Almost the same language used in the case of Alonzo W. Laird, quoted by the Commissioner. Hence it is that the State Court must have been mistaken when it stated that the determination of the local officers, only evidenced by the act of allowing commutation, had not been reversed as to good faith of the entry.

This Court cited with approval a statement in an opinion rendered by Secretary Vilas, as follows: "The preemption purchaser takes by his final proofs, and payment and his certificate of purchase, only a right to a patent for the public lands, *in case the facts* shall be found by the General Land Office and the Interior Department to warrant the issue of it. Whatever claim to a patent he possess by virtue of his payment and certificate, is dependent upon the action of the Department and its *future finding* of the existence of the conditions, and his compliance in fact with the prerequisites prescribed by law to the rightful acquisition of the public land he claims," and held that the Department had authority at any time before patent issues to inquire whether the original entry was in conformity to the Act of Congress.

Hawley v. Diller, 178 U. S. 476.
Michigan Land & Lbr. Co. v. Rust, 168 U. S. 589.

This Court also said: "The obligations of the oath of office of the Secretary of the Interior oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.

Knight v. United States Land Assoc., 142 U. S. 161.

There is no pretense whatever that the entry was in good faith or that the proofs were not in fact fraudulent. A party should come into a court of equity with clean hands.

Estoppel.

The third question involved is that of estoppel. (9th and 10th Specifications of Error.

The complaint alleged (p. 40 Rec.) "that thereafter (the issue of the commutation certificate), and sometime in the month of December, 1892, Warren E. McCord, together with one Daniel McLeod, had some negotiations with the said Jacobus for the purchase of said land from him, he then being the full equitable owner thereof under his said entry certificates of said register and receiver. That during the pendency of negotiations for the purchase of said land by said plaintiff and said McLeod, they had an interview with the defendant Hill, in which interview the said defendant stated to said plaintiff and McLeod, that he did not have and would not make any claim to said land; that he had been fairly beaten in his contest with Jacobus, and that if the plaintiff should buy the said land he would make no claim to it; that the plaintiff relied upon such statements of said Hill in making their purchase of the land, and thereafter they purchased," etc. * * "The plaintiff further shows that thereafter, and on or about the 4th day of January, 1893, *for the purpose of putting the understanding* between said plaintiff and McLeod in writing, the said parties entered into the following agreement."

The agreement is given later.

McCord testifies (p. 239 Rec.) under objection, that the agreement was in writing, etc. "We asked him (Hill) if he had any claim on the land and he said no. He said he had been fairly beaten in his contest with Jacobus, and made no claim to it whatever. I had a previous conversation with him in which he advised us to buy the land of Jacobus. He said if we would give him some logs he had skidded up there, that he could sell down to Iron River to help him

along a little, he would be perfectly satisfied, and let him live on there until the first of May." * * "Plaintiff's exhibit "J" is Hill's relinquishment with us that he would not make trouble on the claim."

On cross-examination (p. 246 Rec.), referring to a previous examination before one Rogers; Question: Was this question asked you, You didn't buy on what Hill said? You bought on the strength of Jacobus' title? and did you answer, Yes, sir? Ans. I think so.

The foregoing is all of the testimony of McCord upon this subject. It does not meet the allegations of the complaint, and states expressly that the whole agreement was reduced to writing, and was simply a relinquishment of his then present claim to the United States.

The writing referred to is as follows (p. 40 Rec.), and is set out in full in the complaint:

"For the purpose of making a settlement with John F. Hill and his relinquishment on the N. W. ¼ of section 17, town 48, range 8 W., we hereby make him a present of a certain lot of logs, now skidded on said land, and give him permission till the first day of May, A. D. 1893, in which to enter on said land to remove said logs, and to occupy the house on said land and to remain on said land until that date, but not thereafter. Said logs amount to about 30,000 feet, and he agrees not to cut nor allow any of his men to cut or destroy any other timber. And in consideration of said logs, I, John F. Hill, being duly sworn, on oath, says that he is the man who made a soldier's application for said N. W. ¼ of 17-48-8 W., and I make this affidavit for the purpose of relinquishing all my right, title and interest in and to said claim, which I do unto the United States. Signed, sealed and delivered and agreed upon this 4th day of January, A. D. 1893.

In Presence of
W. H. PACKARD.
TRACY LYON.

DANIEL MCLEOD.
W. E. MCCORD. (Seal)
JOHN F. HILL. (Seal)

STATE OF WISCONSIN, } ss.
Bayfield County, }

Personally came before me, this 4th day of January, A. D. 1893, the above named John F. Hill, to me known to be the person who executed the foregoing instrument, and acknowledged the same. W. H. PACKARD, Notary Public.

It will be observed this is merely a relinquishment to the United States, made after McCord had purchased the land, and does not contain any statement such as testified to by McCord. Under familiar rules such writing is conclusively presumed to speak the whole agreement.

The State Court in its first opinion (p. 19 Rec.), concluded there was no estoppel. That the only element of estoppel that could possibly have existed was the statement that "he had been fairly beaten in his contest with Jacobus." (But that defeat was on the sole ground that Jacobus had a prior right of entry.) "That none of his other declarations or promises are inconsistent with the claim Hill now makes."

In the second opinion (p. 23 Rec.), these declarations were not disturbed. In the last opinion (p. 301 Rec.), the Court held that Hill's statement would constitute an estoppel, if the Court is wrong in its construction of the decision of the Land Department.

In this last decision of the Supreme Court, they assert that appellant must be charged as constructive trustee of the whole title for the respondent, and decreed to convey it to him, if the construction we have placed on the various decisions of the Land Office be erroneous and that contended for by appellant be correct. The Court only reaches this conclusion in case the ground upon which the case is decided is found to be untenable, and hence the determination of the Federal question as to the proper construction of the Satute and decisions of the Department is essential in order to give force and effect to the alternative determination. If that Court is correct in the construction it has given to such act and decisions, then there could be no estoppel, as the title must be confirmed in McCord under the law. So that in either event this Court must pass upon the question of the proper construction of such Act and such decisions, and the rights of the parties under them. What is urged as an estoppel, if it had any force or existence, is not an independent ground sufficient to sustain the judgment, but an element growing out of and inseparably connected with the question of construction stated, and rights of the parties under such Act and decision.

Estoppel is not pleaded or claimed as a ground of relief.

The alleged conversation is stated (p. 40 Rec.) as a mere preface to the written relinquishment. It is expressly averred "that for the purpose of putting the understanding in writing the said parties made and entered into the following agreement" (here follows the relinquishment), and all that is claimed for the conversation in the complaint is that it was an agreement afterwards reduced to writing to relinquish all claim to the land to the United States. No claim is made that it operated as an estoppel, nor is any relief demanded or prayed on any such ground.

If, however, such issue was involved, and might be considered an independent ground, still its determination requires a construction of the laws of the United States.

The estoppel, if any, reaches back to the relinquishment, and the question is thereby presented whether Hill, under the homestead laws, was precluded from initiating such contest by reason of such relinquishment or the prior verbal understanding. Further, the question is presented whether under the homestead laws, Hill was precluded by reason of such relinquishment and prior verbal understanding from making an entry of the land and its allowance by the land officers.

Beyond all this, however, it presents the important question whether a homestead entry can be made or confirmed for the benefit of another or to inure to another. This interview, preceding the relinquishment, was prior to the preference right of entry awarded Hill, and hence prior to his application to enter. The law requires that the applicant in his application shall state under oath, "that his application is honestly and in good faith for the purpose of actual settlement and cultivation, and not for the *benefit of any other person*, persons or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporaaion or syndicate, to give them the benefit of the land entered, *but in good faith to obtain a home for myself*, and that I have not directly or *indirectly* made, and will not make any agree-

ment or contract in any way or manner with any person or persons, corporation or syndicate whatsoever, by which the title I might acquire from the government of the United States should *inure* in whole or in part to the benefit of any person except myself."

In the decision of the Commissioner in the case at bar, he refers to the case, *Dougherty*, 10 L. D. 79, and states that in that case the request of counsel for entryman to make a new entry was denied for the reason that he cannot make a homestead entry for the benefit of another, for the entry must be for his own exclusive use and benefit.

Not only is the homestead laws in question, but it is conclusive that there can be no such thing as title inuring to another of a homestead by reason of a prior estoppel. If Hill had made an agreement with McCord to convey the homestead when obtained to McCord, such agreement would be absolutely void and could not be enforced. If he had conveyed the land with covenants of warranty, the title when obtained by Hill would not inure to McCord. How, then, can a mere casual conversation, not amounting to an agreement, have any such effect?

There was not a single element of estoppel in the transaction. That he was fairly beaten was but the expression of a mere opinion, not the representation of a material fact. It had no reference to the acquisition of a new and independent title. He performed all he agreed, to wit, relinquishment to the government of all claim.

Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544.
Aiken v. Kellogg, 119 N. Y. 449.
Mitchell v. Fisher, 94 Ind. 108.

It does not appear he had full knowledge of the facts which resulted in determining the invalidity of the Jacobus entry.

Brunt v. Virginia Coal & Iron Co., 93 U. S. 326.
Fay v. Tower, 58 Me. 286-290.

Nor there was an intention to mislead or culpable negligence.

Brunt v. Virginia Coal & Iron Co., 93 U. S. 326.
Kingman v. Graham, 51 Wis. 246.

Nor but what McCord had the same means of knowledge.

Brunt v. Virginia Coal & Iron Co., 93 U. S. 326.

An estoppel by declaration relates only to the subject of the declaration, and does not prevent the party from relying upon an independent matter or a subsequently-acquired right.

Clark v. Hale, 74 Mass. 187.
Bigelow v. Woodward, 81 Mass. 560.
Thrift v. Delaney, 69 Cal. 188.

It never applies to shield or protect a fraud.

Mistake of Law Alleged not Found by the Court.

(11TH SPECIFICATION OF ERROR.)

The mistake alleged was in holding that because Jacobus was unable to make supplemental proof he was thereby excluded from the provisions of the Act of June 3, 1896. That it was never found by any of the officers of the Land Department, in any of said proceedings, that there was any fraud or lack of good faith on the part of said Jacobus. (P. 51 Rec.)

The decision of the State Court goes entirely upon the ground of fraud in making the supplemental proofs. A ground expressly negatived by the complaint.

This is more than mere matter of practice. It relates to a right. Some courts have held that it is an excess of jurisdiction.

In any event, the allegations of the complaint conclusively show that the pleader never intended to claim there was any fraud in the supplemental proofs, or that any supplemental proofs were ever made, but on the contrary, that Jacobus could not make supplemental proofs, by reason of the sale of the land.

Determination of Facts by the Court.

(12TH SPECIFICATION OF ERROR.)

The trial Court determined for itself the facts as to entry, settlement, residence and improvements upon the land by Jacobus, from the evidence and records in the case which was before the Commissioner, instead of determining what facts were determined by the Commissioner or Secretary.

The Supreme Court had tersely stated in its former opinion, that the question was not what were the facts, but what facts the officers of the Land Department had determined to exist. One peculiarity about these findings is that there is not a particle of evidence to support them; that the Court placed itself in the position of the Commissioner. That the determination of the Court reverses that of the Commissioner. These determinations of the Court were of matters of fact, and it should have known that the decision of the Commissioner as to such facts was conclusive.

Judgment Supreme Court.

(13TH, 14TH AND 15TH SPECIFICATIONS OF ERROR.)

These specifications relate to the judgment of the Court. It is assigned as error. It was erroneous for the reasons and upon the grounds hereinbefore stated and discussed. The decision that its former decision upon demurrer was *res adjudicata* upon certain questions is perhaps unimportant here. Of course it could not be, as only the decision of the highest Court qualified to pass upon the question can establish the law of the case. Otherwise we might have conflicting rules of law applicable to the same case.

McCord was not a Purchaser in Good Faith.

(16TH SPECIFICATION OF ERROR.)

McCord testifies: "I was president of the Bank of Iron River. I was interested in the water-works, and in buying timber there. (P. 241 Rec.) We were just starting in dealing in lands as partners together. That was the first claim we bought together." (P. 239 Rec.)

He was dealing in claims. He knew it was against the policy of the law. The abstract in evidence showed mortgage from Jacobus to McCord, October 8, 1892, two months prior to his deed, being the amount required to commute. (P. 242 Rec.) McCord states, however, he knew nothing about that mortgage. (P. 242 Rec.)

McCord obtained a relinquishment from Hill before he purchased, and states he was induced to purchase by Hill's representations that the latter had been fairly beaten. This shows he had doubts sufficient to put him upon inquiry. He deeds back to Jacobus September 5, 1893. This deed

remains in force until after the final decision of the Secretary, to wit, October 17, 1896. If this should be considered the date of his purchase, then such purchase was made with a full knowledge of all the facts and conditions, including the decisions of the Commissioner and Secretary that Jacobus's entry could not be confirmed.

Again: If Jacobus practiced fraud in making his supplemental proofs, McCord was a party to that fraud, and shared the intent and purpose. How can he consistently claim that he comes into Court with clean hands? If any fraud was attempted upon the goverment, it was sufficient to deny confirmation when prayed for on equitable grounds. Such fraud ought to be a sufficient reason, using the language of the Act of Congress, in the discretion of the Commissioner to deny confirmation of an entry.

Respectfully submitted,

W. F. BAILEY,

W. H. STAFFORD,

Attorneys for Plaintiffs in Error.

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SUPREME COURT U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1904

NO. 49.

JOHN F. HILL,

Plaintiff in Error,

vs.

WARREN E. McCORD,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petition for Rehearing

W. F. BAILEY,
W. H. STAFFORD,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1904

NO. 303

JOHN F. HILL,

Plaintiff in Error,

vs.

WARREN E. McCORD,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petition for Rehearing

John F. Hill, plaintiff in error, feeling aggrieved by the decision of this Court, affirming the judgment of the Supreme Court of the State of Wisconsin, and believing from a perusal of the opinion of this Court, delivered herein, that two important questions were overlooked by the Court, most respectfully petitions this Honorable Court for a rehearing upon said questions, and respectfully showeth unto this Court as follows:

The first of these questions is, Whether, at the time of the passage of the Act of June 3, 1896, the matter, to wit: the contest proceedings inaugurated by the plaintiff in

error, was still pending in the Department of the Interior?

It is stated in the opinion of this Court that such matter was pending at the time of the passage of said act.

We respectfully call the attention of the Court, that from the record, page 219, it appears that the final act was the decision of the Secretary of the Interior, made April 28th, 1896, and that no proceedings whatever were taken thereafter until after the passage of the Act of June 3, 1896, when the motion to review the former decision of the Secretary and to confirm the entry of Jacobus under that act were made. That such decision was final and had the effect to restore the land to the public domain seems to be a settled rule of the Interior Department.

Land Decisions, Vol. 6, page 563.
" " " 7, " 163.
" " " 19, " 547.
" " " 20, " 191.
" " " 22, " 77.

Hence it follows, and the decisions above cited so emphatically declare, that the entry, the subject of the final decision of the Secretary of the Interior, becomes and is cancelled, without any further act, entry or record. This being true, the Act of 1896 has no application, as it is expressly declared in and by said act, "That this act shall not apply to commutation and homestead entries in which final certificates have been issued and which have heretofore been cancelled, when the lands made vacant by such cancellation have been re-entered under the homestead act."

That a right of entry acquired is equivalent to an actual

entry seems also to be a rule of the Department, as declared in giving construction to an act using the same term.

4 Land Decisions 463, citing numerous precedents, and also seems to accord with the doctrine of this Court as declared in

Shipley vs. Cowan, 91 U. S. 330.

The second question is: Whether fraud in making a commutation entry precludes an entryman from the beneficial provisions of said Act of June 3, 1896.

That the Secretary expressly found from the evidence, that one of the entries was not in good faith, but was fraudulent, conclusively appears from his decision of the motions to review and confirm, and it is stated in his decision, "The evidence in the case at bar clearly shows that *the entry* was not made in good faith, and the proof submitted by the entryman was fraudulent," etc.

There may be two, and only two, entries under the homestead laws: The first is the original entry for the purpose of acquiring a home. The second is based upon the first, and is called a cash or commutation entry, to be allowed only where certain prescribed conditions actually exist, one of which was continuous residence in good faith, for the sole purpose of making a home for the full period of fourteen months after date of allowance of original entry.

This later entry is one of right, where the prescribed conditions exist. No act is necessary except to verify compliance with such conditions and payment for the land. If the proofs are truthful, and show compliance with the law in this respect, commutation entry follows and becomes

complete as a matter of course. If the proofs are not truthful in this respect, then the commutation entry is fraudulent, and not in good faith. It is immaterial whether the original entry was made in good faith, or otherwise, if the commutation entry was fraudulent. Neither is it a question of what the state court may have found it this respect. The question is, What did the Secretary find and determine? The only possible fraud in making a commutation entry lies in the character of the commutation or final proofs.

This Court in its opinion declares that the entry referred to by the Secretary, was the commutation entry, and the fraud and want of good faith mentioned were in the commutation entry. Quoting from the opinion: "The reference in this (the decision of the Secretary) to the decision of the Commissioner makes it clear that the fraud and the want of good faith mentioned were in the *commutation entry* and the supplemental proofs."

Plaintiff in error strongly insisted that the Secretary found that such commutation entry was fraudulent, and this was one of the principal questions in issue between the parties, the defendant in error insisting and so alleging, that there was no finding of fraud as to such entry.

The evidence was undisputed and conclusive that the commutation proofs were fraudulent. They appear on page 60 *et seq.*, record. Jacobus' affidavit appearing on page 64, in which he states, that himself and wife had resided continuously on the land since first establishing residence thereon; that he was absent at different times two or three weeks at a time, earning money to support his family and improve his place, never absent exceeding three weeks at a

time, and his wife had always lived continuously on the land. The Commissioner found, p. 217 record, that such affidavit was false, in finding that Jacobus only made occasional visits to the land on the Sabbath Day, and that his wife stayed on the land only a part of the time, and we respectfully urge that the Secretary referred to such finding in his decision.

Referring to the provisions of the Act of June 3, 1896, it appears that the very first condition made in the act relates to a fraudulent commutation entry as follows: "That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and, that there was no fraud practiced by the entryman in making such proofs," etc.

We respectfully urge the Secretary could not have had in mind the supplemental proofs, in his statement that the entry was in bad faith, because they were no part of the proceedings relating to the commutation entry, but subsequent.

He must, in the very nature of things, have referred to something that was connected with such entry. The entry to which he referred was some completed act. The commutation entry as stated by this Court. The Secretary declares the entry was in bad faith, and also as a separate and distinct ground, the proofs were also fraudulent. He certainly, as we respectfully urge, could not have referred to the supplemental proofs, in characterizing the entry as being in bad faith, if he did have them in mind in characterizing the proofs as fraudulent. There was, as he de-

clared, bad faith in the entry, independent of the fraud in the proofs, whether original or supplemental.

We therefore respectfully urge, that the Secretary determined there was bad faith in the entry of Jacobus, and this Court has declared that he referred to the commutation entry, and hence such determinations became and are absolute against any right of Jacobus or his grantee to the land, and are conclusive against them under the Act of June 3, 1896.

Most respectfull submitted,

W. F. BAILEY,
W. H. STAFFORD,
Counsel for Plaintiff in Error.

I, W. F. Bailey, counsel for the plaintiff in error, do hereby certify that the foregoing petition is, in my opinion, well founded in law, and that it is not interposed for delay.

W. F. BAILEY.

FILE COPY.

United States Supreme Court

October Term, 1904.

Office Supreme Court U. S.
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Clerk.

NUMBER 49.

JOHN F. HILL,

Plaintiff in Error,

vs.

WARREN E. McCORD,

Defendant in Error.

Brief for Defendant in Error.

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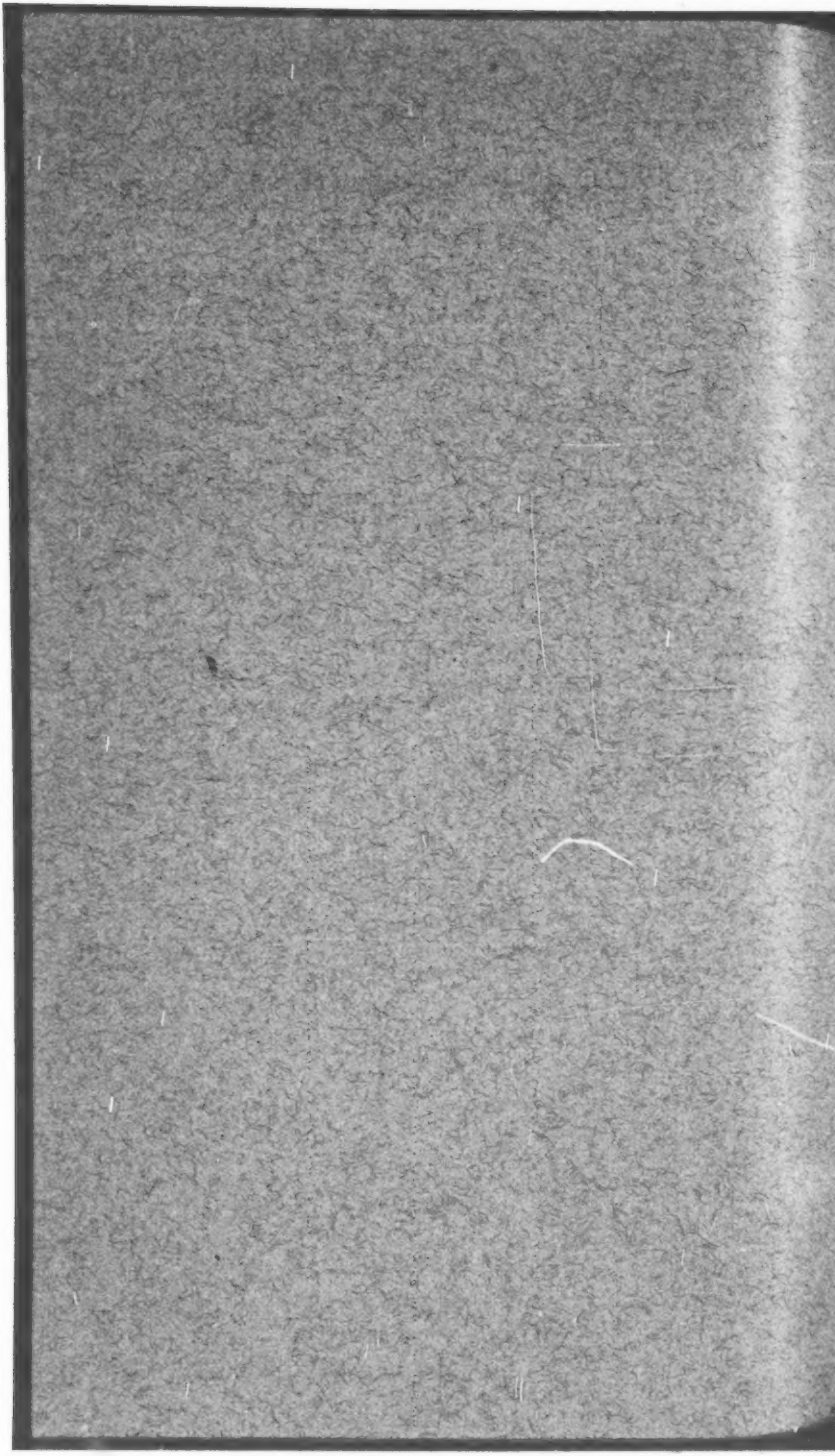

United States Supreme Court

October Term, 1904.

NUMBER 49.

JOHN F. HILL,

Plaintiff in Error,

vs.

WARREN E. McCORD,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

It appears from the findings of fact made by the trial court in this action that one Philip W. Jacobus settled upon the land in controversy on the 28th day of January, 1891, and established his residence upon such land on the 4th day of February, of such year. The land was not open for settlement until February 23rd, 1891, and on that date the said Jacobus presented to the land office at Ashland, Wisconsin, an application for a homestead entry. At the same date the Plaintiff in Error filed a soldier's declaratory statement for the same land, and upon the contest which was heard by the land office, Mr. Hill's declaratory statement was cancelled and Jacobus awarded a right of entry to the land on July 6th, 1892. Rec. page 227. On September 20, 1892, Jacobus applied to the land office to commute the homestead entry to a cash entry; this was allowed and Jacobus paid $400 for such land, receiving a certificate therefor. Record, page 228. On December 27, 1892, Jacobus conveyed the land to the plaintiff

in error and one Daniel McLeod, giving a warranty deed to them in consideration of the sum of $4,150. Neither McCord nor McLeod had any interest in the land prior to such conveyance and had no negotiation with Jacobus before he had commuted his homestead entry. Record, page 229. While the plaintiff in error and McLeod were negotiating with Jacobus for the land, they inquired of the defendant in error as to his claim, and as to the title of Jacobus, and the defendant in error stated to them that he had been fairly beaten in his contest, and had no claim upon the land, and if they purchased it he would make no claim to it. Record, p. 229. He further called their attention to Jacobus' claim, recommended his title and advised them to buy it. (Rec. 239.) The commutation by Jacobus had been allowed by the local land office in ignorance of the requirements of the act of March 3rd, 1891, which required fourteen months residence and occupation before commutation should be made. On May 15, 1893, the assistant commissioner of the land office sent a letter to the register of the local land office requiring Jacobus to furnish supplemental proofs showing a residence upon the land for fourteen months subsequent to July 6, 1892, which was assumed as the date of the entry. As Jacobus had sold the land he was unable to comply with this requirement, but in attempting to do so he obtained from the plaintiff in error and McLeod a deed to such land and executed to them a mortgage in return. He then filed certain supplementary proofs, which showed the conveyance and the re-conveyance and the residence upon the land from the 20th day of February, 1893, to the time of the filing of the affidavits. The plaintiff in error filed a protest against such proofs and affidavits of contest, alleging sale and abandonment of the land and attacking the entry and residence of Jacobus. After a hearing upon such contest, the register of the land office decided that the residence of Jacobus upon the land was fairly satisfactory until the sale of the land in December, 1892, but that the subsequent residence was for the sole purpose of enabling him to secure title for his transferees. Record, pp. 230-231. An appeal was taken by Jacobus to the Commissioner and the opinion of the register was affirmed, upon the ground that he re-conveyance was simply for the purpose of making proofs for the benefit of McCord and McLeod. Upon

an appeal to the Secretary of the Interior, the decision of the Commissioner was affirmed without re-stating the facts. Record, p. 231. Thereafter, an Act of Congress approved June 3rd, 1896, provided for the relief of cases where the commutation of the homestead entry had been made in ignorance of the requirement of fourteen months settlement by the act of 1891. Believing himself to be within this act, Jacobus made a motion before the Secretary for review of his decision and also to confirm his entry under the act of 1896. On August 4th, 1896, the Secretary treating the offer to file supplementary proofs as an application for equitable relief to re-enter the lands for the benefit of another, rendered his opinion to the effect that the entry was not made in good faith and that proofs were fraudulent, so that the review could not be had and for the same reason the entry could not be confirmed under the act of 1896. Record, pp. 231-232. Thereafter, the defendant Hill received a preference right of entry and was allowed to re-enter the land September 7, 1896, receiving a patent therefor on January 12, 1897. Record, p. 232. In October, 1896, Jacobus conveyed all his interest in the land to McCord and McLeod, and thereafter McLeod conveyed all his interest to McCord, the plaintiff in error. Record, p. 232.

The action was brought by the plaintiff, McCord, seeking to hold the defendant as trustee for the land under the claim that upon the facts as found by the Secretary of the Interior, Jacobus was within the act of 1896, but that the Secretary refused to confirm his entry under that act because of a mistake of law. This mistake of law was alleged to consist in the holding that the fraud of which Jacobus was found to be guilty, was sufficient to exclude him from the benefits of the act of 1896. The complaint set out the various opinions and documents in the case at length, so that the main facts were presented to the court for determination. Record, pp. 37-53. A general demurrer was interposed by the defendant. Record, p. 54. The demurrer having been sustained in the lower court, an appeal was taken to the supreme court of Wisconsin, and after argument, the decision of the lower court was reversed. The opinion of the supreme court is found in the record, pp. 11-26. It was held by that court, that the fraud found by the Department of the Interior to

exist in the proofs submitted by Jacobus, was in his conveyance of the land to McCord and McLeod and his attempting settlement upon the land after the re-conveyance to him. This, the supreme court held as a matter of law, was not sufficient to deprive Jacobus of the benefits of the act of 1896, and the complaint was considered to otherwise show that Jacobus was within this act. Upon motion, the supreme court ordered re-argument upon certain questions. Record, p. 27. The opinion of the court upon this re-argument is found in the record, pp. 28-33, and the complaint was sustained upon the points argued.

The defendant thereupon answered, setting out at length the testimony upon the contest before the register of the Ashland Land Office. Record, pp. 54-225. The case was tried in the lower court and judgment entered for the plaintiff. Upon appeal, the judgment of the lower court was affirmed. In the opinion of the court it was stated that the complaint had been substantially proved and that it was shown as alleged that the Secretary of the Interior had refused to confirm the entry under the act of 1896, because of what he considered the fraud of Jacobus in attempting settlement after the re-conveyance of the land to him. As a further ground for decision, the supreme court held that Hill was estopped because of his representations to McCord and McLeod in December, 1892. Record, pp. 227-303. From such judgment of the supreme court of Wisconsin this writ of error is taken to this court.

Counsel for the Plaintiff in Error have argued substantially the following propositions:

1. That Philip W. Jacobus, the grantor of the Defendant in Error, was not within the construction of the Act of June 3rd, 1896.

2. That Mr. Jacobus' entry was canceled and the land re-entered by Mr. Hill, prior to the passage of the Law of June 3rd, 1896.

3. That the proper construction of the opinion of the Secretary of the Interior, of August 4th, 1896, is that he

found from the evidence and record before him, that there was fraud on the part of Jacobus, in his commutation proofs of September 20, 1892.

4. That the Plaintiff in Error is not estopped from claiming the title to this land.

5. That no mistake of law on the part of the Secretary of Interior is found to exist.

6. That the findings of the State Court are not supported by evidence.

7. That the Defendant in Error is not a purchaser in good faith.

There are many minor questions discussed in the brief of counsel but we believe the above substantially cover the main points.

ARGUMENT.

In view of the fact that the principal controversy in the state courts has been upon the third proposition, *i. e.*, whether the Secretary of the Interior, in his decision of August 4th, 1896, found that there was fraud on the part of the entryman, Mr. Jacobus, in the making of his commutation proofs, that a determination of this question, if favorable to the Plaintiff in Error will render it unnecessary to examine many of the other questions, and the further fact that the discussion of this question will, to a very large degree, cover the points involved in the other propositions, we think it advisable, and that we can better aid the court in arriving at a correct conclusion, to discuss the third proposition first.

I.

Did the Secretary of the Interior in his decision of August 4th, 1896 (found in the Record, page 272) find that there was fraud in the commutation proofs of September 20th, 1892, or did any of the officials of the Land Department find such to be the fact?

In the discussion of this question, counsel for the Plaintiff in Error dwell principally upon the language of the Secretary, set forth in the closing part of the opinion: "The

evidence in the case at bar clearly shows that the entry was not made in good faith and the proof submitted by the entryman was fraudulent, *as fully set out in your office decision of January* 23, 1895. It is likewise impossible to confirm the entry under the provisions of the Act of June 3rd, 1896, for the same reason, namely, practice of fraud in making proofs. Both the motion for re-view and the motion to confirm are accordingly denied."

It is freely conceded that if counsel for Plaintiff in Error are correct in this construction of the opinion of the Secretary and such opinion is sustained by the evidence, the courts will not review such determination. On the other hand, we confidently maintain that the language of the Honorable Secretary of the Interior, when read in the light of all the attendant circumstances, means just what state courts have held it meant; that the want of good faith and the fraudulent proof, related solely to the *supplemental proof* required to be furnished by Mr. Jacobus in the letter of the Commissioner of May 15th, 1893 (Record 67).

Counsel, in their brief, argue that it is only upon the facts found by the officials of the Land Department that a person can be adjudged by the courts to be entitled to the land, notwithstanding an adverse, erroneous ruling upon some question of law, and refer to the language used by the Supreme Court of Wisconsin in the first opinion, as sustaining that contention, as well as one or two other authorities. We submit that such is not the rule whenever the department fails, by reason of such erroneous ruling, to pass upon the facts. In Lytle vs. The State of Arkansas, 9 Howrad, 314, this court stated the rule as follows, page 333: "It is a well established principle that where an individual, in the prosecution of a right, does everything which the law requires him to do and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him. In this case, the pre-emptive right of Cloyes having been proved and an offer to pay the money for the land claimed by him under the Act of 1830, nothing more could be done by him and nothing more could be required of him under that act * * * * The claim of a pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right, but when cov-

ered by law it becomes a legal right subject to be defeated only by a failure to perform the conditions annexed to it."

This ruling is approved in the Yosemite Valley case, 15 Wall., 91 and in Moss vs. Dowman, 176 U. S., 418. We understand the rule to be well settled that where an entryman does all that the law requires to obtain public lands and he is denied his legal right by erroneous ruling or mis-application of the law by the land department officials, he may recover the land in the courts, after patent, where such facts are shown, and that the department did not determine any fact against him. As for instance: The department officers erroneously determined that the land was not subject to entry, or that settlement and residence did not give a preference right, or, as in the case at bar, the submission of improper supplemental proofs prevented the claimant from coming within the act of June 3rd, 1896. Any other doctrine would practically exclude the courts from any jurisdiction, for the reason that many times, where the land department officials were mistaken as to the law, they would not determine the facts. We allude to this rule at the outset, because counsel for the Plaintiff in Error have criticized the findings of the state courts to the effect that Mr. Jacobus, in his settlement, residence, improvements, occupation, application and proofs upon this land, fully complied with every requirement of law, and we invoke the rule often laid down by this court, that *these findings of fact are not subject to review.*

Egan vs. Hart, 165 U. S., 188;
Stanley vs. Schwalby, 162 U. S., 255;
Bartlett vs. Lockwood, 160 U. S., 386.

In the last case, this court held that it would not review the decision of the New York court of appeals as to whether a car load of rags were ordered by the collector to be disinfected, even though the order, ambiguous in its terms, was in writing. The findings of fact by the trial court, (Record 272, 279) we think cover all the questions involved in the issue and make clear that Mr. Jacobus performed every act required of him to insure his legal right to the land in controversy. These findings are all confirmed by the Supreme Court except as to the entry of Mr. Jacobus relating back to his settlement, and

upon this we think the evidence amply sustains the trial court's conclusion and is rather one of law than of fact.

Under the authorities and for the reasons above mentoined, we approach the discussion of the proper construction of the Secretary's opinion with a little broader view than suggested by counsel of the Plaintiff in Error and we shall maintain that if the department officers found the facts in favor of Mr. Jacobus, or if by reason of an erroneous ruling of law, they failed to find the facts, that it is the duty of the court to give relief, and we call attention that the state courts have found as a fact, that the language of the Secretary of the Interior, above quoted, referred only to the supplemental proofs. (Record 278)

It will be noticed that the brief of counsel for Plaintiff in Error omits any reference to the findings of the department or other evidence relating to the settlement, residence and occupation of Philip W. Jacobus prior to the commutation proofs of September 20, 1892 ,simply alluding to the fact that Mr. Jacobus contested Mr. Hill's entry which was canceled on July 7th, 1892, (page 1 of brief). The testimony of Mr. Jacobus upon the last contest (Rec. 138) shows that he settled upon the land in question in January, 1891, and on February 23rd, 1891, he applied to enter the land and that his entry was not allowed until July, 1892.

It appears from the decision of the Assistant Commissioner, dated April 29th, 1892, (Rec. 38) "That Jacobus' first acts of settlement upon the land were performed January 28, 1891, and on February 4 he moved his family, consisting of a wife, thereon; he has, in the way of improvements, a small house and some clearing, valued at from thirty-five up to one hundred and fifty dollars; his residence on the land has been continuous, though he has been absent a considerable portion of the time, laboring at his trade for the purpose of earning money to support himself and wife and improve his claim."

It appears from the decision of the Register and Receiver (Rec. 264) that "Mr. Jacobus settled on the land before the date of the Wisconsin Central opening, February 23, 1891; that his application for a homestead entry on that day, was rejected because the land was covered by a soldier's declaratory statement, by John F. Hill."

In his homestead affidavit of July 6th, 1892 (Rec. 60) Jacobus states that he settled on the land January 28, 1891, established a residence with his family February 4th, '91, and that his application of July 6th is in lieu of an application dated February 23, 1891, for the same land.

In the commutation proofs, made and filed September 20, 1892, the witnesses Rusk and Augusta both testify that Mr. Jacobus settled upon and established his residence upon this land in February, 1891. The allowance of the commutation proofs and the making of the certificate of entry by the Register September 20th, 1892 (Record 285) the payment for the land and the Receiver's receipt of the same date, (Record 286) would of themselves be evidence of the finding by those officers of full compliance with the law on the part of Mr. Jacobus.

Orchard vs. Alexander, 157 U. S., 377;
Lytle vs. Arkansas, 9 Howard, 333;
Smith vs. United States, 170 U. S., 377.

In addition to this, however, there had been a direct finding of the settlement, residence, application and its rejection by the commissioner, under date of April 29th, 1892, upon a contest between the same parties, wherein Mr. Hill's entry was canceled, followed by the allowance of the application of Mr. Jacobus, made in lieu of his previous one of February 23, 1891.

On December 27th, 1892, more than three months after making his commutation proofs, Mr. Jacobus sold and conveyed the land to the Defendant in Error and one McLeod, and notwithstanding the position taken in the brief of counsel for Plaintiff in Error, we assert that there is not a syllable in the record impeaching the entire good faith of that transaction, much less any evidence which would warrant this court in reviewing the decision of the trial court, affirmed by the Supreme Court of Wisconsin, even though the findings of those courts were open to review here.

Without referring to the evidence in detail, it is very plain that after this sale Mr. Jacobus did not continue to live upon the land until some time in February, 1893, when he first learned that there was some question as to his right to

make his final proof at the time he did so. On May 15th, 1893 (Rec. 67) the Commissioner, referring to the Act of March 3, 1891, and the date of Mr. Jacobus' entry as July 6th, '92, by letter to the Register and Receiver, called upon Mr. Jacobus to furnish supplemental proof showing residence, and cultivation for a period of fourteen months subsequent to July 6th, 1892, with non-alienation affidavit. Mr. Jacobus, knowing that he had conveyed the land, endeavored to avoid the making of such supplemental proof but the Commissioner, under date of July 6th, 1893, held that he must do so. (Rec. 67.)

On September 1st, 1893, the land was re-conveyed to Mr. Jacobus, who, in return gave a mortgage to secure the purchasers for the amount they had paid for the land, (Rec. 288) and on September 12th, 1893, Mr. Jacobus filed affidavits of Mr. McCord, Mr. Kenney, Mr. Augusta and himself, as such supplemental proofs. (Record 261-264) In his own affidavit Mr. Jacobus states that he sold the land on the 27th of December (the word September in printed record is erroneous), 1892, believing he had a right to do so and that he had secured a re-conveyance on September 5th and given a mortgage to the parties and that he made such affidavit "*in lieu of final homestead affidavit, form* 4-069."

It will be observed that nowhere in this supplemental proof is there any suggestion that the land was conveyed back to Mr. Jacobus in order that he might re-establish his residence or procure the land for any other person but upon the hearing of the contest, Mr. Jacobus testified that it was conveyed back simply for the purpose of enabling him to make proof. (Record 157-161.)

Counsel for Plaintiff in Error, in their brief, page 2, speak of these affidavits as "What the defendant has termed the supplemental proofs, called for by the Commissioner October 6th, 1893." If the Defendant in Error or his counsel were the only persons terming these affidavits supplemental proofs, the statement might be warranted, but unfortunately for counsel, the record makes this too clear for argument. The Assistant Commissioner, in his letter of November 18th, 1893, in reviewing the objections made by Mr. Jacobus to allowing Mr. Hill to contest his entry (Rec. 69), says: "Said

commutation, being prematurely made, you were directed by my letter "C," May 15 ,1893, to require supplemental proof which was forwarded by you September 22, 1893." In the opinion of the same officer, dated February 24, 1894, (Rec. 69) he says: "September 22, 1893, you forwarded corroborated affidavit of Jacobus and McCord, filed in your office July 12, 1893, as *a response to the call for supplemental proof and you forwarded a protest by Hill against the acceptance of such supplemental proof, on the ground that Jacobus had abandoned the land, etc.*" In the opinion of the Register and Receiver, August 9, 1894, (Rec. 264) they say: "The proof being premature, he was required by letter "C," May 15th, 1893, to make supplemental proof, which was offered September 20th, and transmitted to the General Land Office September 22, 1893." And on page 265—"September 12, 1893, the day of making supplemental proof, Jacobus and wife executed a mortgage," etc. Page 266—"We are of the opinion, therefore, that Jacobus' supplemental proof cannot be sustained." In the opinion of the Commissioner of January 23, 1895, (Rec. 268) he says: "But still a conveyance of the land is clearly proven, it is also shown clearly that the land was re-conveyed to defendant so that he could submit his *final supplemental* proof for the benefit of McLeod and McCord." These papers, if correctly copied in the record will be found endorsed as supplemental proofs and they were sent specially to the Register and Receiver to be present and considered in the contest, (Rec. 286) showing minutes on the certificate of entry "Supplemental proof returned to R. and R. for use at hearing by H., April 18th, '94, and attorneys advised. C. C. M." Counsel for the Plaintiff in Error may be excusable in endeavoring to avoid these papers being considered as the supplemental proofs which were offered and rejected, in view of the fact that they have a very important bearing in the case against the position which they assume.

It was under the circumstances above stated that Mr. Hill, who testifies (Rec. 121) *that he was keeping a close watch on Jacobus in* 1892 *and in* 1893, *in order to contest his entry,* protested against the supplemental proof as stated in the opinion of Commissioner Bowers at page 69, and then filed his contest affidavit shown, Record 292 and 293, with the corroborative affidavits of Charles Helmer and A. B. Ross.

In this affidavit Mr. Hill states that Mr. Jacobus "did not settle upon or enter said land in good faith for the purpose of making it his home, but for purposes of speculation. On September 20th, 1892, Jacobus made final proof and commuted and within a short time sold timber and all of the land and wholly abandoned the land and has since continued to abandon the land and for a period of over six months next prior to the *date hereof.* (September 30, 1893) Jacobus and witnesses testified falsely in making his final proof * * * * affiant has been informed and verily believes that W. E. McCord, who purchased the land and timber, deeded the land back to Jacobus in order that Jacobus might make the supplemental proof required by the Hon. Commissioner, and has offered said Jacobus a salary if he would live on the land till patent issued. In spite of his abandonment and in spite of the fact that Jacobus has not lived on said land, in order that he could make the supplemental proof required by the Hon. Commissioner's order, Jacobus went to Ashland on September 8th, 1893, for the purpose of making supplemental proof," etc.

It will be observed that in this affidavit, much stress is laid upon Mr. Jacobus' having abandoned the land, having sold it, and that he was endeavoring to regain the land and make supplemental proof for the benefit of other persons. The corroborative affidavit of Mr. Ross is confined wholly to the conveyance of the land and the deeding of it back to Mr. Jacobus so he could make supplemental proofs. (Rec. 294). The corroborative affidavit of Mr. Helmer, while in general terms, states more, yet states no particular fact to be within the knowledge of the witness except that Jacobus had abandoned the claim. Upon these affidavits, the Commissioner, under date of November 18, 1893 (Rec. 259) by letter "H," referred the contest to the Register and Receiver at Ashland, Wisconsin. The Commissioner states the contest in this language: "Hill alleges in substance, by affidavit of himself and others, that the entryman never settled upon the said land in good faith to make it a home but for the purpose of speculation; that he did not reside on the land during the *six months next preceeding the making of his proof*, but instead lived at Iron River with his family, where he kept a barber shop, and that he has sold the land to one W. E. Mc-

Cord." While the statement of the contest in this letter is broad enough, perhaps, to permit the local officers to go back of the Commissioner's decision of April 29th, 1892, and the commutation proofs made to their satisfaction on September 20, 1892, it is a significant fact that the charge in Mr. Hill's affidavit of the abandonment of the land for a period of six months *next prior to the date of same, September* 20th, 1893, should be stated in the Commissioner's letter as *six months next preceding the making of his proof.* If the supplemental proof is intended by the Commissioner, the two dates are at once harmonized, for the supplemental proof was forwarded with Mr. Hill's protest and his contest affidavit followed within a very few days. The letter in no way refers to the *commutation* proof, which, as the law was then interpreted by the Commissioner, was of no consequence, being made within ninety days of the entry, when fourteen months was understood at this time to be necessary. No reference is made in the letter to the statement in Mr. Hill's affidavit that Mr. Jacobus and his witnesses had testified falsely in making such proof. On motion for review of this permission to contest, the Commissioner, under date of February 24th, 1894, refers to the forwarding of the supplemental proof and the *protest by Mr. Hill against the acceptance of the same on the ground that Jacobus had abandoned the land.* The protest of Mr. Hill does not appear in the record in detail, but the charge in it seems to be largely the basis of the contest. Whatever may have been intended by the Commissioner, it is very plain that the Register and Receiver understood that the gist of the contest was abandonment of the land and the sale of the same being abar to the offering of supplemental proof. (Rec. 264). This may have been partially induced by the position of Mr. Hill's counsel on the contest, (Record 139) where he objected to any evidence being received as to residence, occupation or improvements prior to July 6th, 1892, and claiming that the contest as submitted, only covered the time subsequent to that date. He again (Record 170) entered a general objection as to all questions relating to 1891.

The testimony taken upon the contest is quite voluminous, pages 71 to 214. Counsel for Plaintiff in Error in their brief, pages 27 and 28, refer to two or three statements by Mr. Jacobus and his wife. We have had some difficulty in finding

the testimony so referred to. The first reference is to Mrs. Jacobus' testimony (Rec. 142) and quotes only a part of a single answer where the witness was asked "What times were you on the place during the spring and summer season of 1892, if you can tell?" At page 148 Mr. Jacobus testifies that he was there about one-half the time and (Rec. 149) that he was on the land in '91, three weeks at a time helping to make the improvements. In the season of '91 Mr. Jacobus worked at his barber trade in Superior, some thirty miles from the land, but worked at Iron River, the town in which the land lies, from last of April, 1892, about the time of the Commissioner's decision of April 29th, 1892, awarding him the land. (Rec. 38 and 152). He continued to work at his barber trade at Iron River, only a short distance from the land, was out there every Sunday and two or three days in the week. (Rec. 155). Record 160 he says: "I believe that that was my home; my family lived there and I lived there as much as I could when I was not away earning a living for us. We had no other home; did not have any home anywhere else." The testimony of Mrs. Jacobus immediately following the reference on page 28 of counsel's brief, speaking of the spring of 1892: "Easter was in April, then I went back in April and stayed a few days after Easter; then I went back in the claim. I don't know just when Easter was then. I stayed all the time until June, it was between the middle or last part of June when I came in." (Rec. 174). I went back on Sunday after the 4th and remained there until we proved up, I didn't go to town at all. Then I went to town and went back again and stayed until the last of November or December."

The testimony of Mr. Jacobus and his wife and in fact all of the witnesses on the contest, with the possible exception of Mr. Hill, make the improvements by way of clearing, buildings, fencing and cultivation as extensive and valuable as any statement contained in the commutation proofs. The testimony of Mr. and Mrs. Jacobus, shows beyond cavil that their home and only home was upon this land, Mr. Jacobus having a barber shop only a few miles distant, and was treasurer of the town where his homestead claim was located. It is true that Mr. Jacobus spent the larger part of his time in his barber shop working at his trade, but was improving

his claim as fast as his means would permit, his wife being there nearly all of the time with his household furniture and effects.

After hearing all of the testimony, the Register and Receiver made their findings and rendered their opinion on August 9th, 1894, which counsel for the Plaintiff in Error are pleased to term a report. (Rec. 264-266). In this opinion, after stating the gist of the contest: (1) Did Jacobus abandon the land? (2) Was the sale of the land to McLeod and McCord a bar to the offering of supplemental proof? They say, upon the first point, the testimony of the witnesses is extremely conflicting. It is admitted by Jacobus that he worked at his trade at Superior and Iron River most of the time during his occupancy of the land but it seems also fairly well established by the testimony of Mrs. Jacobus and numerous other witnesses that her residence was upon the land, barring certain absences on account of sickness and visits. Their cabin and its housekeeping equipment were superior to those of most homesteaders and the clearing, in extent and cultivation, compared favorably with that of others in the same neighborhood." They then refer to the learning of the supplemental proof and the return to the land and the offering of the supplemental proof and continue: "Upon the whole the residence of Jacobus upon the land was fairly satisfactory until after the offering of his first proof, but it is clear that his subsequent residence was for the sole purpose of enabling him to make proof, in order to secure title to his transferees." They then refer to the sale of the land in December, '92, and the re-conveyance September 1st, and the execution of a mortgage September 12th, 1893, the day of making the supplemental proof; that the sale was absolute and the subsequent residence of Jacobus upon the land was as agent of the transferees and for the purpose of acquiring title for them. It is taken for granted that the deed back was made in good faith, but the slender residence of Mrs. Jacobus in the summer of 1893 was not upon the homestead of Jacobus but upon the land in which he had no claim or interest; concluding the opinion as follows: "That the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for the benefit of his grantees, we are of the opinion therefore, that Jacobus'

supplemental proof cannot be sustained and the entry should be canceled and the preference right of entry awarded to the contestant Hill." It is too plain for argument that the Register and Receiver found in favor of Mr. Jacobus as to his residence, occupation and improvements of the land, and canceled his entry because the supplemental proofs were not made in good faith for his own benefit and could not be sustained.

On appeal to the Commissioner, after referring to the statement in the appeal and the letter of May 15th, directing Jacobus to furnish supplemental proof, he says: (Rec. 267) "It is shown by the evidence that defendant had a small log house on the land; that it was well finished and well furnished; that he had about two acres cleared; that the improvements were worth about $200; he did not have any stock of any description; no chickens or other poultry; that on December 27th, 1892, defendant sold said land to David McLeod and Warren E. McCord for $5250 cash. On the question of residence, the testimony is very conflicting. Defendant's wife stayed on the land part of the time and defendant worked at his trade; he made occasional visits to the land on the Sabbath day. It also appears that defendant *obtained three rooms in Iron River after he had sold the land* and he, with his wife, moved into them; that after defendant learned that he was required to furnish supplemental proof, because his commutation proof was premature, his wife moved back to the land but defendant still remained in Iron River, making occasional visits to the land on the Sabbath and returning the same day." He then quotes the testimony of Mr. Jacobus that he continued to reside upon the land so that the men who bought it would not be the losers by it; that was the reason and the only reason, and that the land was conveyed back to him for the purpose of enabling him to make the proof and clear the title. After discussing three cases in the Land Department, all touching the question of permitting supplemental proofs to be made, concludes the opinion as follows: "The sale and conveyance of the land is clearly proven and it is also clearly shown that the land was re-conveyed to the defendant so that he could submit his final supplemental proof for the benefit of McLeod and McCord, hence your opinion is affirmed and this homestead and his cash

entry for the land involved, is held for cancellation." It will be noticed that the portion of the Commissioner's decision in which he touches upon the residence of the claimant, follows immediately the reference to the sale of the land on December 27th. He then passes the question of residence simply with the remark that the testimony is very conflicting and after alluding to the defendant's working at his trade in Iron River (not in Superior, where he was more than a year after his first settlement) he then takes up the renting of rooms in Iron River after the sale of the land and its re-conveyance for the purpose of making supplemental proof and clearing title. There is not a syllable in this opinion indicating that the Commissioner held or intended to hold that Mr. Jacobus' residence up to the time of the selling of the land was not satisfactorily established, as found by the Register and Receiver. In the closing paragraph, the Commissioner affirms the opinion of the Register and Receiver squarely upon the ground that the *final supplemental proof* could not be sustained. Even assuming his statement that the testimony regarding the residence was very conflicting, referred to the time anti-dating the sale of the land, it would be far from holding that Mr. Jacobus' residence was not upon the land or that the weight of the testimony was not in his favor. Nor does the fact that he worked at his trade in Iron River in any way indicate that his residence was not upon the land.

It will be observed that neither the Register and Receiver or the Commissioner, in their opinions, refer to the commutation profs of September 20th, 1892, or to any false statement therein, nor do they compare the testimony given upon the contest with any of the statements made by Mr. Jacobus or his witnesses in making such commutation proof. Both opinions refer explicitly to the supplemental proofs and it is plain that the conclusion reached in each of the opinions is based upon such proofs, and the endorsement on the certificate of entry (Rec. 268) shows that the supplemental proofs were sent them to be considered. Again, a full reading of the testimony and proceedings upon the contest including a lengthy cross-examination of Mr. Jacobus and William Rusk, one of the witnesses making the commutation proofs and also upon the contest (Rec. 61 and 203) shows there is no suggestion or question indicating that it was claimed that

they had testified falsely in making such proofs. In fact as before alluded to, Mr. Hill's attorney on the contest claimed that there was no issue as to Mr. Jacobus' residence prior to July 6th, 1892, being nearly the entire period covered by such proofs, and it seems the other witnesses to the commutation proofs, Herbert H. Augusta (Rec. 63) is the identical person mentioned in the Secretary's opinion (Rec. 272) to whom a special dispensation was granted, and his entry confirmed to his grantee, without supplemental proofs being made.

The whole opinion of the Commissioner shows beyond controversy that he was dealing with this case as an application to confirm the entry and allow the title to pass notwithstanding the sale, contrary to the technical provisions of law. In other words, he had already ruled that under the statute of March 3rd, 1891, fourteen months residence was necessary subsequent to the allowance of the entry (Rec. 258) and the sale and conveyance of the land being admitted, he was trying the application as one addressed to his discretionary power, and Jacobus, having concealed the fact in his suppiemental proofs, thatthe land was conveyed back to him in order that he could make the proofs for other persons, he therefore disallows the application, referring to the three cases mentioned in the opinion, all of which are applicable to that view; inapplicable if the Commissioner had determined that Mr. Jacobus never resided upon the land and his commutation proofs were false. The quotation from Cann vs. Connor is: "After the submission of final proof and hearing had thereon, *additional time will not be given in the presence of an adverse claim and where bad faith is evident.*" What additional time did Jacobus require? Simply to make his *new residence* complete. When was the adverse claim made? More than a year after his commutation proof. What bad faith? Attempting to *make his residence good to secure the land for his grantees.* Take the Laird case. "One who enters with no intention of establishing residence in good faith." Jacobus went back into possession after leaving the land, *to make proofs for his grantees,* "and subsequently submits fraudulent final proof." Jacobus, after returning to the land, submitted his final supplemental proofs. They were called for because his commutation proofs were premature.

The Dougherty case referred to by the Commissioner makes this construction altogether certain. The request *"to make a new entry was denied, for the reason that he could not make a homestead entry for the benefit of another."* Then follows the closing paragraph: "The sale and conveyance of the land is clearly proven and it is also clearly shown that the land was re-conveyed to defendant so that he could submit his final supplemental proof for the benefit of McLeod and McCord, hence your opinion is affirmed." We submit it is too clear for argument, that the Commissioner in his opinion, is dealing with Jacobus' effort to move back upon the land, acquire a new residence of six months and then prove up for the benefit of others. In effect an application to make a *new entry* as in the Dougherty case. There is no finding of any bad faith or fraud in the Commissioner's opinion. The only reference to either is in the quotations from the authorities cited and these references are all to the point of allowing Jacobus to return to the land to make title for another.

The case then went to the Hon. Secretary of the Interior, who, under date of April 28th, 1896 (Rec. 268), affirms the decision of the Commissioner in this language: *"Said decision fairly sets forth al lthe facts in this case,* and the conclusion therein reached is sustained by the testimony and is in conformity with law and the decisions of the Department and is hereby affirmed." Can it be for a moment maintained that, if the *decision of the Commissioner was based upon the lack of residence* of Mr. Jacobus from *February*, 1891, to September 20*th*, 1892, *or that he had testified falsely in making* his commutation proof, *that such opinion set forth all of such facts?* On June 8th, 1896, after the passage of the act of June 3rd, but before any rule had been promulgated by the department, two motions were made to the Secretary of the Interior, one to review the decision already made, the other to confirm, under the act of '96 (Rec. 269-272.) In the motion to review, the application is still treated as one for equitable consideration as in the Augusta case, 21 L. D. 200, while the one to confirm is based upon the act of June 3rd, 1896.

Upon these motions, and with the full record of the contest before him, the Honorable Secretary of the Interior delivered his opinion of August 4th, 1896 (Rec. 272), upon which counsel for the Plaintiff in Error base their claim of a finding to the effect that Mr. Jacobus never resided upon or

properly improved the land and that his entry from the beginning was fraudulent and the commutation proof made September 20th, 1892, was false, and for this reason the courts have no jurisdiction, because the Secretary of the Interior decided these facts against Mr. Jacobus and canceled his entry. It will be borne in mind that, except the motion to confirm upder the act of 1896, all of the proceedings, including the three opinions referred to and the motion for review of the same, were upon the supposition that upder the act of March 3rd, 1891, fourteen months actual residence was required *subsequent to the allowance of the entry on July 6th*, 1892, and that the proceedings were *equitable in their nature, following the Augusta case*, and that the supplemental proof was the only proof which would be pertinent to that inquiry. In other words, the conveyance of the land having been made three months after the commutation proofs and five and one-half months after the allowance of the entry, and the Secretary being asked to disregard the technical application of the statute for fourteen months' residence ,and the supplemental proofs being submitted for that purpose, the language of his opinion becomes, to our minds, quite clear and the refusal to review, stated in the third paragraph, is placed squarely upon the supplemental proof. The Secretary, after alluding to the Augusta case, says: "The evidence in the case at bar clearly shows that the entry was not made in good ftaih and the proof submitted by the entryman was fraudulent, *as fully set out in your offi e decision of January 23d*, 1895."

The last line of the paragraph referring to the decision of the Commissioner of January 23, 1895, *would be false* if the proof intended was that of September 20th, 1892, which was in no way referred to in that opinion. And the other part of this paragraph, to-wit: "The evidence in the case at bar clearly shows that the entry was not made in good faith," is, in our opinion, also qualified by the last line as being fully set out in the opinion of the Commissioner. On the other hand, if we are correct in our construction that the evidence to which the Secretary alludes is that quoted in the Commissioner's decision, from Mr. Jacobus' cross examination, in which he testified that the canveyance back was for the purpose of enabling him to acquire title for other persons and

that the conveyance of the land was clearly proven, then the closing line of the Secretary' sopinion, above referred to, is not only a correct reference to the Commissioner's decision but is true in every sense of the word, and the lack of good waith lay in the circumstance that Jacobus had taken a re-conveyance and sought to acquire the land for the benefit of others *without disclosing that it was for the benefit of others,* until he testified upon the contest; and it was doubtless this concealment which led to the Secretary's conclusion of lack of good faith.

II.

Was Philip W. Jacobus within the Act of June 3rd, 1896?

Counsel for the Plaintiff in Error, in their brief, 17 and 18, enumerate in seven paragraphs the essential elements to bring the entryman within the Act of '96 and we accept and repeat such enumeration:

1. That an error has heretofore been made by the officers of the local land office in receiving premature proof under the homestead laws.
2. That there was no fraud practiced by the entryman in making such proof.
3. That final payment has been made.
4. That a final certificate has been issued to him.
5. That there are no adverse claimants to the land, whose rights originated prior to such final proof.
6. That no other reasons exist except the making of such premature commutation.
7. That there was at least six months actual residence by the entryman prior to such commutation.

Counsel concedes that the first, third and fourth of these would be determined by the record and it would be difficult to maintain any other view, especially with the record then in the office of the Secretary, held there by the motion to review. The allowance of the entry, July 6th, 1892, the premature commutation proofs, September 20th of the same year and the passage of the act of 1896 would seem to be sufficient to cover the first point. The third and fourth are proven by the Receiver's receipt (Rec. 286) and the certificate of entry (Rec. 285.) We are unable to discover any reason

why the fifth condition is not also to be determined by the record. The endorsement on the certificate of entry seems to be a complete record of the transactions in regard to this land from the time of the allowance of the homestead entry by Jacobus, July 6th, 1892, to the cancellation of the cash entry, September 10th, 1896. (Rec. 285 and 286). The tract book of this land was put in evidence (Rec. 288) and shows the complete history of the land from July 6th, 1892 to the patent January 11, 1897. The contest awarding Mr. Hill a preference right and cancelling Mr. Jacobus' entries and all proceedings therein, were a matter of record, and was still pending before the Secretary, both Jacobus and Hill claiming to occupy the land. We think this entirely sufficient to satisfy condition number five. See also finding of State Court, Rec. 278.

Numbers 2, 6 and 7 were also fully covered by the record then made up. A large amount of evidence had been taken and both claimants to the land were before the department and had notice of this application. If there was any error in determining the rights of these claimants to this land before the Secretary and upon the evidence and documents on file in the contest proceedings without requiring new evidence to be given, it was an error on the part of the Secretary of the Interior in so deciding the case upon the merits and excluding Mr. Jacobus from the benefits of that act, without proper proceedings before the department, this, of itself, would be a mistake of law and would give the court jurisdiction to find the facts, and it has done so.

Counsel in their brief, 18, say: "How could the Commissioner determine whether fraud had been practiced in making proofs from the record itself? If fraud appeared on the face of the proofs, there certainly would have been no commutation certificate or entry and hence the act would have no application."

Counsel seem to overlook their strenuous claim that the Secretary of the Interior did find such fraud from the record before him in the contest proceedings, before the motion to confirm was made. We have endeavored to show that this position is unsound but it is quite evident that the Secretary of the Interior, with the entire proceedings before him, had

ample opportunity to find such fraud, if it had existed. Counsel contend that there should have been new proofs presented instead of those consisting of the evidence taken upon the contest, all of the opinions of the department officials and the records and documents on file in the department. Why ex parte affidavits would have been more satisfactory than such record is not pointed out. The circular referred to on page 19 of counsel's brief, was not issued until after these motions were submitted and we believe not until after they were heard.

Counsel maintain that the six months residence required by the act, must have been subsequent to the date of the allowance of the entry July 6th, 1892. The language of the act is: "Six months actual residence in good faith by the homestead entryman on the land *prior to such commutation.*" In view of the errors which Congress was endeavoring to correct, (the acceptance of premature proofs, less than fourteen monthe after the allowance of the entry) it would be very strange if that body sought to require six months residence after the entry under the new law, that it did not say so, instead of providing the requirement in regard to residence to be a different time (six months) prior to the making of commutation proofs. We confess we are unable to appreciate the argument of counsel on this point. Section 2301, giving the right of commutation to a homestead entryman, states that it may be made "at any time before the expiration of the five years, on making proof of settlement and cultivation as provided by law granting pre-emption rights." Sections 2259 to 2266 covering the subject of pre-emption claimants, nowhere provides for six months residence after entry or after making any claim to the land, and the six months residence required by rule of the Department, was after settlement and not after entry.

Lambert vs. Fairchild, 5 L. D., 675;
4 L. D., 287 and 418;
6 L. D., 234 and 573.

In Kuepper vs. Tripp, 26 L. D., 561, the entry was confirmed under the act of '96 by the Secretary of the Interior, even though only four months elapsed between the date of the entry, April 22, 1891, and commutation proofs, August

25, 1891. See discussion by Wisconsin Supreme Court, Rec. 31.

Counsel contend that the application should have been made direct to the Commissioner and that the Secretary had no jurisdiction. The case of Kuepper vs. Tripp, supra, indicates that the Secretary of the Interior did not so regard the law, for he confirmed that entry on appeal in a contest proceeding, without the Commissioner taking cognizance, under the act of 1896. In Anders vs. Hasselquist, 24 L. D. 351, the Secretary of the Interior confirmed the entry under the act of '96, after it had been held for cancellation by the Commissioner, and without application to the Commissioner to confirm under that act.

Attorney General McVeagh rendered an opinion reported in 19 A. G. Op. 205, upon this question: "Has the Secretary of the Interior jurisdiction to review decisions of the Commissioner of Patents, rendered under Rule 110, Rules of Practice of the Patent Office, and overrule motions to amend preliminary statements in interference cases." And in that opinion reviewed many of the statutes, decisions and precedents, reaching the conclusion that the Secretary, under his supervisory power had jurisdiction. We think the cases in this court are too numerous to necessitate discussion of this question, the rule being settled that the Secretary of the Interior, as the head of the Land Department of the United States, has jurisdiction and power to review the action of the subordinate officers, and may do this on appeal or by direct order and may take the initiative in any proceedings over which the department has control.

Knight vs. Land Association, 142 U. S., 161;
Orchard vs. Alexander, 157 U. S., 372;
Michigan Lumber Co. vs. Rust, 168 U. S., 589;
Snyder vs. Sickles, 98 U. S., 203.

In Buena Vista vs. Railroad Company, 112 U. S., 165, an Act of Congress authorized the Commissioner of the General Land office to select swamp lands and it was held that the Secretary had original jurisdiction.

Counsel argue, pages 21 and 22 of their brief, that Mr. Jacobus' entry was canceled ipso facto by the Secretary's af-

firmance, dated April 28th, 1896. The endorsement on the certificate and minutes in the land office show that it was not canceled until September 10th, 1896. The letter of the Commissioner to the Register and Receiver at Ashland, Wisconsin, (Rec. 289) informing them of the denial of the motion for review and stating: "Said case is accordingly closed; notify the parties in interest; the entries are hereby canceled; so advise Hill and of his right to enter the land"; is dated September 10th, 1896. Under rules 66 and 67 of the Land Department (see Mathews & Conway, digest of 1888, XIX), whenever a motion to review is made, the case is held and cancellation does not take effect. In James vs. German Insurance Co., 89 Federal Rep., 811, 46 C. C. A., 476, same case, 107 Federal 597, the circuit court of appeals of the Eighth Circuit held that the entry was not canceled until communicated to the local officers. The case reviews the rules and decisions of the department and we submit, the conclusions are correct. Rule 114, 23 L. D., 707 expressly provides that a motion for review before the Secretary operates as a supersedeas.

Counsel argue that the land was re-entered within the meaning of the last clause of Sec. 1 of the Act of June 3rd, 1896, because Mr. Hill had been awarded a preference right. If we are correct in our position as to the cancellation of Mr. Jacobus' entry, this argument is already effectually answered. If we are not, we think it is too clear for argument that a mere preference right is not such an entry or segregation of the land as would prevent the act of Congress operating in favor of the former claimant. It is shown by the record that Mr. Hill did not enter the land until September 7th, 1896.

Davis case, 19 L. D., 489.
Hendrickson, 13 L. D., 169.

It is contended by counsel that the fact that Mr. Jacobus sold and conveyed the land in question is evidence of his bad faith in making the entry and they cite several departmental decisions touching that phase of the case but none of them, as we believe, in point. It has frequently been held that a sale of land after the final certificate issues is but

an exercise of the legal right of the holder and is no evidence of improper conduct.

Myers vs. Croft, 13 Wall., 291;
Murphy vs. Barron, 4 L. D., 134;
In re Leman, 8 L. D., 486.

Certainly there is no finding in the department that this sale was not bona fide and the courts have held affirmatively that it was made in good faith.

IV.

Is the Plaintiff in Error estopped from asserting any fraud on the part of Mr. Jacobus prior to the purchase of the land by McCord and McLeod, December 27th, 1892? Has this court jurisdiction to review that question?

The Supreme Court of Wisconsin held that he was so estopped, and upon that ground the plaintiff in error must be held to hold the title to this land in trust (Rec. 301.) Counsel for the Plaintiff in Error, at pages 35 and 36 of their brief, set out a part of Mr. McCord's testimony and state that it is all he gave on that subject, in which they are mistaken. Mr. McCord further testified: (Rec. 239) "I had a conversation with Mr. Hill prior to that, as to Mr. Jacobus' desiring to sell his land. Mr. Hill called my attention to it, said that Jacobus had a good claim and he wanted to sell it, and advised us to buy it; I mean myself and McLeod." Also that Mr. Hill knew that they were looking over the land with a view to buying it, and, at page 240, that they relied on Mr. Hill's statement, and paid for the land for that reason. Mr. McLeod testified substantially the same, (Case 247) and the court found in accordance with this testimony. (Rec. 276.)

Counsel for the Plaintiff in Error make an unwarranted attack upon the opinion of the state court, stating at page 37 of their brief, that the court in the first opinion held that there was no estoppel, and in the last opinion that the Plaintiff in Error was estopped. The court did not hold in the first opinion that there was no estoppel, except that Mr. Hill was not estopped as to anything which occurred *after* the purchase by McCord and McLeod, the court having held that Mr. Jacobus' entry was cancelled by reason of the supple-

mental proofs, and his conduct with reference thereto, all of which occurred after the sale of the land; that Hill was not estopped from setting up a claim to the land by virtue of such subsequent occurrences. (Rec. 25.) In the last opinion the estoppel is so limited, as that Mr. Hill should not be allowed to set up any conduct of Jacobus prior to the sale, citing many authorities, some of them decisions of this court. (Rec. 301.) Counsel argue that there can be no estoppel for the reason that it would be against public policy that the title procured by Mr. Hill should pass to any other person after patent issued to him. We venture to say that thtre are many cases where the courts have determined that another claimant should have been given the title, where the departmnt had determined and patented the land to a homesteader. It is argued that if Mr. Hill had made an agreement with Mr. McCord to convey the homestead to him, it would have been void and that it would not have enured in case he had given a warranty deed. To our minds, this is not at all decisive of the qrestion, in view of the fact that the laws of the United States give preference to a successful contestant. In Sheply vs. Cowan, 91 U. S., 330, this court recognizes the right of such preference. Mr. Hill was residing upon this land at the time Mr. McCord and Mr. McLeod purchased it. He was the only individual who, up to that time at least, had made any attack upon Mr. Jacobus' claim. He had been beaten in such a contest. He knew that Mr. Jacobus had paid for the land and received his final certificate and receipt. He then advised Mr. McCord and Mr. McLeod to buy the land, recommending Mr. Jacobus' title. It develops later in his contest, that during the year 1892 and evidently at the very time he was making this recommendation, he was watching for an opportunity to make this contest. (Rec. 121). His immediate protest against the supplemental proof of Mr. Jacobus, which was forwarded with such proof, and his statement in his affidavit (Rec. 293) that he entered objection to it, as he believed, before it was filed, indicates clearly that he was on the alert to obtain this claim and it is not beyond the probabilities of the case that he was advising this purchase with the very object in view to disqualify Mr. Jacobus from obtaining the land.

There is ample evidence in the record, and the findings

of the state courts, not reviewable here, make it a verity in the case, that Mr. Hill through fraud induced the defendant in error to buy the full equitable title held by Jacobus, disclaiming any interest on his part, stating that he had been fairly beaten, which was the equivalent of Jacobus' entry being made in good faith and that Jacobus had a good claim or good title. Can Mr. Hill, after doing this and inducing the Defendant in Error, to part with his money be allowed, as against the Defendant in Error, to assert precisely the contrary of the recommendations made at the time of and as an inducement to such purchase? We do not claim that this estoppel could operate to deprive the United States government of this land, no such question arises here. As in Schulenberg vs. Harriman, 21 Wall., 44, the controversy is strictly between private parties, the United States is not interested, and the Plaintiff in Error in no way represents it. In Shepley vs. Cowan, 91 U. S., 330, Mr. Justice Field said: "But whilst * * * * no vested right as against the United States is acquired until all the pre-requisites for the acquisition of the title have been complied with, parties may, as against each other ,acquire a right to be preferred in the purchase or other acquisition of the land, when the United States had determined to sell or donate the property. In all such cases the first in time in the commencement of the proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

Mr. Jacobus, having received his final certificate and paid for the land under circumstances well known to the Plaintiff in Error, was in a position to sell the equitable title, which as held by this court in Stark vs. Starrs, 6 Wall., 402, carried the right to the patent. The Defendant in Error would be fully justified in purchasing such title, upon the disclaimer and recommendation of the Plaintiff in Error. As between the parties to this action, the Wisconsin courts have held that in equity, Mr. Hill's mouth is closed from asserting anything contrary to his previous statements which induced Mr. McCord and Mr. McLeod to purchase this land; that an equitable estoppel arises under the circumstances; which will not permit the Plaintiff in Error to change his position to the detriment of Mr. McCord. In addition to the

cases cited in the opinion of the Wisconsin Supreme Court, at page 301 of the record, we refer to the following:

Wheelton vs. Hardisty, 8 El. & Bl., 231, 262.
Graves vs. Begelow, 6 Vesey, 174, 182.
Slim vs. Croucher, 1 DeGex. F. & J., 518, 522, 524.
Dickerson vs. Colgrove, 100 U. S. 580.
Zabrieskie vs. R. Co., 23 How., 397.
Pendleton Co. vs. Amy, 13 Wall., 297, 305.

To our minds, it is no answer to this argument that a contract on the part of Mr. Hill to sell his homestead right or interest before final proof would be void or that if he had given a warranty deed, the after acquired title would not enure, for the reason that in such case, one claiming title would be claiming under and through Mr. Hill, while in the case at bar the proposition is that while the title passed to Mr. Hill is valid between him and the United States, Hill procured that title by fraud upon Mr. McCord and therefore cannot now be permitted to assert it.

The question of estoppel is one of general law and therefore the decision of the state courts are final. In Rutland Railway vs. Vermont Railway, 159 U. S. 630, the Supreme Court of Vermont held that the law of the state requiring the lessee of a railroad to pay taxes, did not impair any obligation of the contract and further decided upon the ground of laches that there could be no recovery. In the opinion of this court, it is said that the decision against the Plaintiff in Error, upon an independent ground not involving a federal question and broad enough to support the judgment, the writ would be dismissed. In Young vs. Steamship Company, 105 U. S. 41, an action was brought to recover back illegal fees collected by a United States Ship Commissioner and this court refused to re-examine the question of whether the payment was voluntary or otherwise, it not being a federal question. In Eustis vs. Bolles, 150 U. S. 1, the Supreme Court of Massachusetts held that the acceptance of a dividend in insolvency proceedings barred the creditor's claim, although the proceedings would not of themselves have discharged the debtor; which question, this court refused to review. In Peirce vs. Railway, 171 U. S. 641, the Supreme Court of Maine held, first that a statute of that state did not impair the obligation

of the contract but further held that the plaintiff was estopped from raising the question. This court dismissed the writ of error, holding that the estoppel was not a federal question.

In Pittsburg Iron Co. vs. Cleveland Iron Co., 178 U. S., 270, the principal question involved was the title to land in a lake bed under United States patents, it appeared however that the Michigan court rested its decision upon the ground of estoppel, and that there was no federal question, and the case dismissed.

V.

Was there a mistake of law found to exist?

Counsel, at page 40 of their brief, argue that the mistake of law alleged in the complaint was not found by the court. The allegation (Rec. 51) is, that the Department of the Interior held that Mr. Jacobus was precluded from making supplementary proof by reason of having conveyed the land and that the supplemental proof became immaterial and unnecessary under the act of June 3rd, 1896.

The opinion of the Register and Receiver, of August 9, 1894, that of the Commissioner of January 23, 1895, and both opinions of the Secretary are set forth in full (Record 44 to 52) in each of which it appears that the supplemental proofs were disallowed and why they were disallowed, and the court's finding (Rec. 277 and 278) is strictly in accordance with the allegations of the complaint, except that the complaint does not allege any fraud or concealment in the supplemental proofs other than as it appears in the opinions referred to.

VI.

Are the findings of fact supported by the evidence?

Counsel for Plaintiff in Error criticize the trial court for making findings upon the evidence submitted on the contest, as if this was an original question for the court. We have already discussed the circumstances under which this would be proper. If it should be determined by this court that the findings of the Department were in favor of Mr. Jacobus, then we concede that the trial court's findings upon the same facts would be rendered immaterial. If this court

should determine that the officers of the Land Department canceled Mr. Jacobus' entry by reason of the supplemental proofs not being sustained or because they were attempted to be made for the benefit of other persons and therfore to that degree fraudulent, and did not for that reason, determine any other necessary fact in favor of or against Mr. Jacobus, then we submit, it was the duty of the court to make such findings. We contend that the findings of the court are in no way contrary to any fact found by the Land Department, and that each and all such findings are fully sustained by the evidence in the case.

VII.

Was the Defendant in Error a purchaser in good faith?

Counsel argue that Mr. McCord was not a purchaser in good faith, regardless of the findings of the trial and Supreme Courts of Wisconsin to the contrary, and they assert that if there was any concealment or fraud in the supplemental proofs, Mr. McCord was a party to it. The affidavit of Mr. McCord, submitted as a part of the supplemental proof (Rec. 261 and 262) bears date September 5th, '93, and is sworn to in Bayfield County. It states that they paid full value for the land believing that the entryman's title was valid and without any pre-arrangement, plan or agreement; that the reconveyance was made to protect the entryman. There is nothing in the affidavit indicating any improper purpose or that the purchase was not made in the best of faith, Mr. Jacobus having the duplicate receipt; that when it was found that he did not have proper title, it was conveyed back. Mr. Jacobus' affidavit and that of the other witnesses were made at a different place and at a different time. There is not a word of testimony taken on the contest which connects Mr. McCord with any improper conduct nor is there any testimony to that effect, and the court has so found.

In the opinion of the Supreme Court of Wisconsin (Rec. 302) the decision of the trial court is overruled wherein that court held that Mr. Jacobus' entry related back to his settlement, under the Act of May 14th, 1880, 21 Statutes at Large, 140, Section three of which is as follows:

Sec. 3. "Any settler who has settled or who shall here-

after settle on any of the public lands of the United States, whether surveyed or unsurvyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record and his right shall relate back to the date of settlement, the same is if he settled under the pre-emption laws"; that, having made his application of February 23rd, 1891, and such application being rejected because of Mr. Hill's S. D. S. being already filed, which filing was contested and Jacobus' entry allowed on July 6th, 1892; that the initiation of his right anti-dated the passage of the act of 1891 and that his entry related back to the time of his application and therefore, that his commutation proofs were sufficient, being more than fourteen months residence subsequent to his entry which related back to the first application. The decision of the Supreme Court of Wisconsin is, that the allegations of the complaint in this regard were not proved. We believe this conclusion is erroneous and the trial court was right.

The evidence given by Mr. Jacobus on the contest, the opinion of the Commissioner of April 29th, 1892, the opinion of the Register and Receiver of August 9th, 1894, show Mr. Jacobus' settlement and application as alleged in the complaint and his homestead affidavit of July 6th, 1892 (Rec. 60) states that it is made in lieu of the application and affidavit dated February 23rd, 1891, for the same land. The fact that a new paper was filed in lieu of the previous application which was rejected and which was insisted upon by reason of the contest immediately filed, does not, in our judgment, have the effect of delaying the application under the rule that we have already invoked, that where an applicant for public lands has done all that the law requires of him to obtain public lands, he loses no right by reason of any adverse action of the land department officials.

See, in addition to cases already cited,

Ard. vs. Brandon, 156 U. S., 537.
Mass. vs. Dowman, 176 U. S., 413.

In conclusion we submit that the only federal question

for review in this court is, whether the officers of the Land Department held as a fact that Mr. Jacobus' entry and commutation proofs were fraudulent and that in so far as this is a question of fact, the findings of the state courts will not be reviewed. We submit further that the true construction of the opinions of the officers of the Land Department, including that of the Honorable Secretary of the Interior is, that they found no fraud or lack of good faith upon the part of Jacobus, except with reference to his supplemental proof, influenced by the erroneous call for such proofs, and the circumstance that Mr. Jacobus had conveyed the land, which in no way affected his right to the land under the Act of June 3rd, 1896. We submit further, that Mr. Hill is estopped from asserting any fraud or improper conduct on the part of Mr. Jacobus, prior to December 27th, 1892; that the determination of the state courts upon that question is final, and that there is no error in the record.

Dated October, 1904.

A. L. SANBORN,

Attorney for Defendant in Error.

L. K. LUSE,

LYMAN T. POWELL,

Of Counsel.

Supreme Court of the United States.

No. 49.—October Term, 1904.

John F. Hill, Plaintiff in Error, vs. Warren E. McCord. } In error to the Supreme Court of the State of Wisconsin.

[December 5, 1904.]

This was a suit in equity commenced in the Circuit Court of Douglas County, Wisconsin, by Warren E. McCord to obtain a decree adjudging the defendant, now plaintiff in error, John F. Hill, the holder of the legal title to the northwest quarter of section seventeen, in township forty-eight north, of range eight west, in Bayfield County, Wisconsin, in trust for the plaintiff. A demurrer to an amended complaint was sustained by the Circuit Court, but this ruling was reversed by the Supreme Court of the State. 111 Wis. 499. Thereafter an answer was filed, a hearing had, resulting in a decree for the plaintiff, which was affirmed by the Supreme Court, 117 Wis. 306, and thence the case was brought here on error.

The following facts were found by the trial court and the findings were sustained by the Supreme Court: One Philip W. Jacobus made an actual settlement on the land in controversy on January 28, 1891, and actually established his residence thereon February 4. The land was not opened for entry until February 23, 1891, and on that day Jacobus made application at the local land office to enter it as a homestead. On the same day Hill filed a soldier's declaratory statement for the same tract. A contest was had before the local land officers, resulting in a decision in favor of Jacobus. On appeal to the Commissioner of the General Land Office, this decision was affirmed. Hill's declaratory statement was canceled and the entry of Jacobus allowed on July 6, 1892. On September 20, 1892, Jacobus commuted his homestead entry, making and filing in good faith due, regular and truthful proofs of settlement, occupation and improvements, paying $400 and receiving a receiver's receipt and a certificate of entry certifying that he had purchased the land, had made full payment, and was entitled, on presentation of the certificate to the Commissioner of the General Land Office, to receive a patent.

On December 27, 1892, McCord and one Daniel McLeod purchased the land in good faith of Jacobus, paying him the sum of $4,250 and receiving a warranty deed. The negotiations between these grantees and Jacobus commenced on or about December 17, 1892, and prior to that time they had no interest in the land and had no negotiations with him.

While negotiating with Jacobus they asked Hill, at the time residing on a part of the tract, whether he had any claim upon the land and whether Jacobus had good title thereto, and Hill then and there said to them that he had been fairly beaten in his contest with Jacobus, that he had no claim, and that if McCord and McLeod would buy the tract he would make no claim. At that time Hill knew that they were looking at the land with a view of purchasing it from Jacobus, and that the inquiry was made of him with reference to that purchase, and they did in fact rely upon Hill's statement and purchased the land and paid for the same by reason thereof.

A few days after the deed, and on January 4, 1893, for the purpose of putting the understanding between themselves and Hill in writing, the grantees had this instrument executed and acknowledged by Hill:

"For the purpose of making a settlement with John F. Hill, and his relinquishment on the N. W. ¼ of section 17, township 48, range 8 W., we hereby make him a present of a certain lot of logs, now skidded on said land, and give him permission till the 1st day of May, A. D. 1893, in which to enter on said land to remove said logs, and to occupy the house on said land and to remain on said land until that date, but not thereafter. Said logs amount to about 30,000 feet, and he agrees not to cut nor allow any of his men to cut or destroy any other timber. And in consideration of said logs, I, John F. Hill, being duly sworn, on oath, says that *he is* the man who made a soldier's application for said N. W. ¼ of 17–48–8 W., and I make this affidavit for the purpose of relinquishing all my right, title and interest in and to said claim, which I do unto the United States. Signed, sealed and delivered and agreed upon this 4th day of January, A. D. 1893.

In presence of— DANIEL MCLEOD.
W. H. PACKARD. W. E. MCCORD. [Seal.]
TRACY LYON. JOHN F. HILL. [Seal.]"

Prior to the commutation, and on March 3, 1891, Congress had passed an act amending section 2301 of the Revised Statutes, so as to read as follows:

"Nothing in this chapter shall be so construed as to prevent any person, who shall hereafter avail himself of the benefits of section 2289, from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months." (26 Stat. 1098.)

Neither Jacobus nor the land officers had any actual knowledge or information of this enactment at the time of the commutation. On May 15, 1893, the Assistant Commissioner of the General Land Office of the United States, having had his attention called to the act, notified Jacobus that he must furnish supplemental proofs showing residence and cultivation for a period of fourteen months subsequent to July 6, 1892, together with an affidavit that he had not alienated the land. Of course, compliance with this was

impossible, for Jacobus had already made a conveyance. On September 1, 1893, McCord and McLeod, with their wives, made to Jacobus a deed of conveyance of the land for an expressed consideration of $4,300, and Jacobus at the same time executed to them a mortgage upon the lands to secure the payment of the purchase money. On or about September 12, 1893, Jacobus caused to be made and filed in the local land office, in response to the order of supplemental proofs, certain affidavits and proofs, from which it appeared that the land was conveyed to McCord and McLeod and reconveyed, as hereinbefore stated; that Jacobus retained two acres of the land, and shortly after the sale of the said premises, and on or about February 20, 1893, he again went upon the land, and from that time up to the time of the filing of the affidavits continued to reside upon and improve the land. It did not appear that the purpose of the reconveyance and the return of Jacobus to the land was to obtain a title for the benefit of McCord and McLeod.

On or about September 30, 1893, Hill filed in the local land office contest affidavits and objections to the receiving of said offered supplemental proofs. A hearing was had upon this contest and a large number of witnesses sworn. On August 9, 1894, the local land officers decided the contest in favor of Hill, and filed an opinion, in which they held that the residence of Jacobus up to the time of the sale and conveyance to McCord and McLeod in September, 1892, was fairly satisfactory, but that his residence after the sale and conveyance was for the sole purpose of enabling him to make proof to secure title for them, and that the land was reconveyed to him for that purpose alone. On appeal to the Commissioner of the General Land Office the findings of the local land officers were affirmed. On further appeal to the Secretary of the Interior the prior decisions were, on April 28, 1896, affirmed without any restatement of facts. On June 3, 1896, Congress passed an act containing the following provisions (29 Stat. 197):

"That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry, whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs and legal representatives, as of the date of such final certificate of entry, and a patent issue thereon; and the title so pat-

ented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate: *Provided,* That this shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been cancelled when the lands made vacant by such cancellation have been re-entered under the homestead act.

"SEC. 2. That all commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement."

Thereupon Jacobus made a motion before the Secretary of the Interior for a review of the decision of April 28, 1896, and also to confirm his entry under the authority of said act of June, 1896, which motions were denied. A patent was subsequently issued to Hill.

Mr. Justice BREWER delivered the opinion of the Court.

There are two well-settled rules of decision, invoked respectively by the parties. One, that findings of fact made by the Land Department in the progress of a contest before it are conclusive upon the courts; the other, that questions of fact decided by a State court are not subject to review by this court in proceedings on error.

Upon the record these questions of fact and law appear: First, was the original entry allowed to Jacobus on July 6, 1892, rightful? In other words, was his evidence of settlement, occupation and good faith true, and, if so, did it entitle him to priority over Hill, his contestant? Second, if that entry was valid, was the commutation entry made on September 20, 1892, illegal? Third, if so, was the defect which invalidated it subject to removal under the act of June 3, 1896? Fourth, if removable, was there anything in the conduct of Jacobus or his grantees after the original entry to prevent the removal?

With reference to the first question, it appears that the original entry to Jacobus followed a contest between himself and Hill. In that contest testimony was taken before the local land officers upon the question whether Jacobus had performed the acts required of a settler upon public lands, and upon a review the Commissioner of the General Land Office, on April 29, 1892, found in favor of his settlement, residence and improvements, and allowed the entry. No appeal was taken from this decision, and if nothing else appeared the findings would obviously be conclusive in the courts as between Jacobus and Hill. It is undoubtedly true that, until the legal title has passed from the Government, proceedings in the land office are *in fieri,* and a question whether of fact or law may be reopened for consideration. *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 589–592, and cases cited. It is insisted that the validity of the original entry was relitigated in the land office in pursuance of the contest made by Hill in October, 1893, and a different conclusion reached. While the power of re-examination is not to be doubted, yet a decision upon a question of fact, once

made in a special proceeding finally terminated, should not be regarded as overthrown by findings in a subsequent proceeding in the department unless it appears that those findings directly overrule, or are necessarily inconsistent with the prior decision. The application of Hill, in 1893, to contest the entry of Jacobus charged as a basis of contest that Jacobus never settled on the land in good faith, but for the purpose of speculation; that he did not reside on the land during the next six months preceding the making of his final proof, and that he had sold the land to one W. E. McCord. A hearing was had upon this contest before the local land officers, and quite a volume of testimony taken. Their decision was adverse to Jacobus. It was affirmed by the Commissioner of the General Land Office and reaffirmed by the Secretary of the Interior. In their decision the local land officers stated the questions to be considered in these words:

"Letter 'H' of November 18, 1893, directed this office to order a hearing on the charges.

"The two questions to be passed upon are:

(1) Did Jacobus abandon the land?

(2) Was the sale of the land to McCord and McLeod a bar to the offering of supplemental proof?"

And upon the first question they found as follows:

"Upon the first point the testimony of the witnesses is extremely conflicting. It is admitted by Jacobus that he worked at his trade in Superior and Iron River most of the time during his occupancy of the land, but it seems also fairly well established by the testimony of Mrs. Jacobus and numerous other witnesses that her residence was upon the land, barring certain absences on account of sickness and visits. Their cabin and its housekeeping equipment were superior to those of most homesteaders, and the clearing, in extent and cultivation, compared favorably with that of others in the same neighborhood.

"After learning that supplemental proof would probably be required, Mrs. Jacobus returned to the land in February, 1893, where she remained about a week, when she returned to Iron River and remained for some weeks while being treated for rheumatism. She made a brief visit to the claim in March, went there again in the latter part of May, remaining two weeks, and returned for the same time in July. This was apparently her last stay upon the land until after supplemental proof was offered, September 20. A small crop of vegetables and hay was raised that season, as in the two years before.

"Upon the whole the residence of Jacobus upon the land was fairly satisfactory until after the offering of his first proof, but it is clear that his subsequent residence was for the sole purpose of enabling him to make proof in order to secure title for his transferees."

After this they considered the effect of the sale of the land to McCord and McLeod, and in so doing commented upon the character of the occupation by Jacobus and his wife during the spring and summer of 1893, closing with a decision in these words: "We are of the opinion, therefore,

that Jacobus' supplemental proof cannot be sustained, and that the entry should be canceled and a preference right of entry awarded the contestant Hill."

Apparently the character of the occupation and improvements by Jacobus prior to the original entry of July 6, 1892, was not a matter considered by the local land officers, although it is true that there was some testimony respecting it. They did not pretend to disturb the approval of the sufficiency of Jacobus' occupation and improvements made in allowing that entry after the conclusion of the original contest between Hill and Jacobus. They assumed that that matter was already settled. This is evident from the two questions which they say were presented, and if they considered it at all they doubtless thought the testimony was not such as to justify any change in the previous conclusion. This decision was affirmed by the Commissioner of the General Land Office. In his opinion, after reciting the contest, the decision, and the grounds of appeal, the fact of the commutation of the homestead entry, the direction to Jacobus to furnish supplemental proof as the commutation was premature, he says:

"It is shown by the evidence that defendant had a small log house on the land; that it was well finished and well furnished; that he had about two acres cleared; that the improvements were worth about $200. He did not have any stock of any description, no chickens or other poultry; that on December 27, 1892, defendant sold said land to David McLeod and W. E. McCord for $4,250 cash.

"On the question of residence the testimony is very conflicting.

"Defendant's wife stayed on the land a part of the time and defendant worked in his barber shop in the town of Iron River, and stayed there nearly all the time working at his trade; he made occasional visits to the land on the Sabbath day.

"It also appears that the defendant rented three rooms in Iron River after he had sold the land, and he, with his wife, moved into them; that after defendant learned that he was required to furnish supplemental proof, because his commutation was premature, his wife moved back to the land, but defendant still remained in Iron River, making occasional visits to the land on the Sabbath and returning the same day."

Obviously the time of occupation referred to was after the commutation. This is made clear by a comparison of this opinion with that of the local land officers. If other grounds were relied on than those stated in the opinion of the local land officers, they would have been distinctly stated, and the fact that the decision was based upon the character of the occupation and improvements prior to the original entry would have been made clear. This conclusion is strengthened by the final declaration of the Commissioner:

"The sale and conveyance of the land is clearly proven, and it is also as clearly shown that the land was reconveyed to defendant so that he could submit his final supplemental proof for the benefit of McLeod and McCord; hence your opinion is affirmed."

This decision of the Commissioner of the General Land Office was sustained by the Secretary of the Interior in an opinion which contains no recital of facts, but simply says:

"Said decision fairly sets forth all the facts in this case, and the conclusion therein reached is sustained by the testimony and is in conformity with law, and the decisions of the department, and is hereby affirmed."

In the final opinion of the Supreme Court of the State is this statement:

"We still think it plain, therefore, that no questions involving Jacobus' proceedings up to and including the final proof of September, 1892, were passed upon in the consideration of the contest had in 1894. Indeed, this seems to be the view of appellant's counsel as well, for he declares in his brief that 'no question of *mala fides* was found in the making of proofs, (of September, 1892,) nor was the subject considered; simply, from the evidence, which was the same as the affidavits, they determined the second question which they stated at the outset, that the sale of the land to McCord and McLeod was a bar to the offering of supplemental proof.'"

While no such admission is found in the brief filed in this court, possibly the omission may have been induced by the stress of the case.

We agree, therefore, with that court, that there is nothing in the record to justify a conclusion that the Land Department ever changed its finding, made in allowing the original entry, of the sufficiency of Jacobus' occupation and improvements up to that time.

It is also worthy of notice in passing that the Supreme Court in its opinion held that the representations and instrument made and executed by Hill estopped him from questioning the validity of the original entry, so far at least as against the plaintiff, although they would not bar the United States from reclaiming the land.

We proceed, therefore, to a consideration of the other questions. At the time the commutation was allowed neither Jacobus nor the land officers had actual knowledge of the act of March 3, 1891. Such is the finding of the State court, and being a question of fact this finding is conclusive. Prior thereto a commutation made as this was would have been valid, and there is neither finding nor testimony that Jacobus or the land officers acted in bad faith in the matter. There was simply a proceeding, theretofore legal and proper, taken in actual ignorance of a restraining statute. The act of 1896 was obviously passed to reach such a case as this, in which a commutation was allowed within less than fourteen months from the date of the homestead entry, and to do away with the objection on account of the matter of time. Certain provisions were incorporated in order to prevent injustice to other parties. But, as between the Government and the entryman, its purpose was to give validity to the commutation if it would have been valid had not the act of 1891 been passed.

Upon what ground did the Land Department set aside the commutation entry and afterwards refuse to reinstate it? The original entry was July 6,

the commutation September 20, not three months thereafter. The act of 1891 allowed commutation only fourteen months or over after the entry. The commutation, therefore, was illegal. Within less than six months after the original entry and four months after the commutation, Jacobus sold and conveyed the land, and his grantees became thereafter the parties solely interested. Pre-emption and homestead entries by statute must be made for the exclusive use and benefit of the parties making the entries, (Rev. Stat. secs. 2262, 2290,) and in each case an affidavit to that effect is required. Whatever Jacobus did after his conveyance in December, 1892, was not for his exclusive use and benefit. He attempted to get around the limitations and requirement of the statute by taking a reconveyance from his grantees, giving to them at the same time a mortgage to secure the consideration stated in the deed, and by an affidavit stating that at the time of his conveyance in December he reserved about two acres of land where his house and other improvements were located, and that when he heard of the act requiring fourteen months' residence before commutation he again took possession of the tract and continued in occupation and cultivation. This was held insufficient to avoid the restraint of the statute, and upon this ground the commutation entry was set aside. The local land officers, in their opinion, say:

"The bare statement of facts points to the conclusion that the sale of the land in December, 1892, was absolute, and that the subsequent residence of Jacobus upon the land was as the agent of the transferees and for the purpose of acquiring title for them. This conclusion is strongly supported by the admission of Jacobus upon cross-examination.

"Jacobus, by the deed executed in December, 1892, divested himself of all right and title to the land. Granting, therefore, that the reconveyance of September 1st, 1893, was made in good faith by all parties, the slender residence of the wife, during the spring and summer of 1893, was not upon the homestead of Jacobus, but upon land in which he had no claim or interest, and the residence, such as it was, could not avail him in making supplemental proof. But we think all the circumstances, the time at which the conveyance from McCord and McLeod to Jacobus was made, the execution of the mortgage, and the evidence of Jacobus himself, show that the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for the benefit of his grantees. We are of the opinion, therefore, that Jacobus' supplemental proof cannot be sustained, and that the entry should be cancelled and a preference right of entry awarded to the contestant, Hill;"

While the Commissioner of the General Land Office, in his opinion, concludes:

"The sale and conveyance of the land is clearly proven, and it is also clearly shown that the land was reconveyed to defendant, so that he could submit his final supplemental proof for the benefit of McLeod and McCord; hence your opinion is affirmed, and defendant's homestead and his cash entry for the land involved is held for cancellation."

While these opinions may have correctly declared the law as it stood when they were delivered, we may remark in passing that Jacobus seems to have acted in an honest effort to protect his grantees from the consequences of a mistake made by himself and the local land officers at the time of the commutation.

When the act of 1896 was passed the matter was still pending in the department, and no entry had been made by Hill. The motions by Jacobus for a review and to confirm his entry were denied by the Secretary of the Interior, the ground of the decision being, as stated in a communication to the Commissioner of the General Land Office:

"The evidence in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent, as fully set out in your office decision of January 23, 1895.

"It is likewise impossible to confirm the entry under the provisions of the act of June 3, 1896, for the same reason, namely, the practice of fraud in making proofs."

The reference in this to the decision of the Commissioner makes it clear that the fraud and the want of good faith mentioned were in the commutation entry and the supplemental proofs. Evidently the Secretary ruled that the act of 1896 did not confirm a previous premature commutation entry if the entryman was guilty of any fraud or wrong subsequent thereto in attempting to make good the title acquired thereby. We do not so understand the law. If at the time of the commutation entry there had been no fraud or lack of good faith, and the only defect was in the matter of time, we do not think the confirmation authorized by the act of 1896 is destroyed by anything like that shown to have been done by Jacobus in his effort to protect the title he had conveyed to McCord and McLeod: In other words, if the commutation entry was rightful save for the fact that it was premature, the act of 1896 does away with that objection and confirms the entry, and the right to that confirmation is not destroyed by that which the entryman may have done in a subsequent effort to protect his title.

We see no error in the proceedings, and the judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.